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September 16, 2011

Drew Bohan, Executive Director  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, California 95814

**Re: Written Rebuttal Comments to Response to Test Claim Nos. 10-TC-01 and 10-TC-02 submitted by the San Francisco Bay Regional Water Quality Control Board and the California Department of Finance**

Dear Mr. Bohan:

This letter is respectfully submitted on behalf of the City of Brisbane and the County of San Mateo, the San Mateo County Flood Control District, the Cities of Belmont, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo and South San Francisco, and the Towns of Atherton, Colma, Hillsborough, Portola Valley and Woodside (Test Claim No. 10-TC-01) and the City of Alameda and the County of Alameda, the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro and Union City, the Alameda County Flood Control and Water Conservation District, and the Alameda County Flood Control and Water Conservation, Zone 7 (Test Claim No. 10-TC-02) (collectively "Test Claimants") in rebuttal to the Comments of the San Francisco Regional Water Quality Control Board and the California Department of Finance.

The following documents are enclosed herewith:

1. Written Rebuttal Comments to Response to Test Claim Nos. 10-TC-01 and 10-TC-02 submitted by the San Francisco Bay Regional Water Quality Control Board and the California Department of Finance;
2. Declaration of Jon Konnan, and Exhibit E thereto;
3. Declaration of James Scanlin, and Exhibit E thereto; and
4. Index of Relevant Authorities.

Test Claimants further request that all documentation and declarations submitted by the co-claimants (i.e., all Test Claimants other than the City of Alameda and the City of Brisbane)

Drew Bohan, Executive Director  
September 16, 2011  
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be included in the record for these written rebuttal comments. Thank you for your consideration and time.

Very truly yours,

A handwritten signature in blue ink that reads "Greg J. Newmark / ejg". The signature is written in a cursive style.

Gregory J. Newmark

GJN:ejg  
1715722.1

**WRITTEN REBUTTAL COMMENTS TO RESPONSE TO TEST CLAIM NOS.  
10-TC-01 AND 10-TC-02 SUBMITTED BY THE SAN FRANCISCO BAY  
REGIONAL WATER QUALITY CONTROL BOARD AND THE CALIFORNIA  
DEPARTMENT OF FINANCE**

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September 16, 2011

**WRITTEN REBUTTAL COMMENTS TO RESPONSE TO TEST CLAIM NOS.  
10-TC-01 AND 10-TC-02 SUBMITTED BY THE SAN FRANCISCO BAY  
REGIONAL WATER QUALITY CONTROL BOARD AND THE CALIFORNIA  
DEPARTMENT OF FINANCE**

**I. Introduction**

Test Claim No. 10-TC-01 was submitted on behalf of the City of Brisbane and the County of San Mateo, the San Mateo County Flood Control District, the Cities of Belmont, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo and South San Francisco, and the Towns of Atherton, Colma, Hillsborough, Portola Valley and Woodside joined as co-claimants (hereinafter the “San Mateo County Claimants”).

Test Claim No. 10-TC-02 was submitted on behalf of the City of Alameda and the County of Alameda, the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro and Union City, the Alameda County Flood Control and Water Conservation District, and the Alameda County Flood Control and Water Conservation, Zone 7 joined as co-claimants (hereinafter the “Alameda County Claimants,” and together with the San Mateo County Claimants, the “Test Claimants”).

These rebuttal comments respond to arguments asserted by the San Francisco Regional Water Quality Control Board (hereinafter “Regional Board”) and the Department of Finance.<sup>1</sup> The Regional Board’s arguments are nearly identical to those the Commission on State Mandates (hereinafter the “Commission”) has twice rejected in test claims brought by Los Angeles County and San Diego County agencies regarding their storm water permits. The Regional Board admits that the primary thrust of its comments is a request that the Commission abandon its prior reasoning, make contrary determinations, and deny the test claims. There has been no change in the authoritative law since the issuance of the Commission’s prior decisions.<sup>2</sup> Test Claimants respectfully submit that the Commission

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<sup>1</sup> All of the comments asserted by the Department of Finance were also asserted in much greater detail by the Regional Board. These rebuttal comments refer for convenience and clarity only to the Regional Board’s comment letter, but Test Claimants intend that this rebuttal apply equally to the Department of Finance’s arguments as well.

<sup>2</sup> Although the Los Angeles Superior Court has recently ruled in favor of the Regional Board on some issues in Department of Finance v. County of Los Angeles (2011) Los Angeles Superior Court Case No. BS130730, Order Granting Petition for Writ of Mandate and Statement of Decision, Test Claimants note that this decision is neither (footnote continued)

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should apply the same analysis it has before and find that the Municipal Regional Stormwater Permit, Order No. R2-2009-0074 (“MRP”) provisions raised in these test claims are reimbursable state mandates.

The Regional Board’s arguments fall into two broad categories. The first category is comprised of legal arguments that the obligations of the MRP are allegedly federal mandates rather than state mandates. As the Commission has previously, and correctly, determined, the MRP provisions are not federal mandates because: 1) they exceed the requirements of the Clean Water Act and the United States Environmental Protection Agency’s (“EPA’s”) regulations, and 2) the Regional Board freely chose to impose the requirements and exercised its true discretion in determining the implementation of federal law.

The second category of Regional Board arguments are factual contentions that the MRP requirements do not constitute new programs or higher levels of service in comparison to the prior permits. These arguments fail because, as explained in detail below, the MRP provisions at issue in these test claims mandate new programs that were never before required and higher levels of service than were previously required. The Regional Board’s citation to prior permit provisions, management plans and workplans that somewhat relate to the same subject matter do not alter that fact.

The Commission and all Californians are well aware that public entities in California are facing financial hardships not seen for generations. Essential public services are being cut, and employees are being laid off or furloughed. Yet even while enduring these economic difficulties, local governments must still serve the public and protect the environment. Like the Regional Board, Test Claimants are committed to protecting water quality, but unlike the Regional Board, Test Claimants bear most of the financial burden of implementation and compliance. Test Claimants initiated these test claims regarding the new programs and higher levels of service imposed by the Regional Board’s MRP to obtain subvention that will enable them to fulfill the new financial obligations imposed by the MRP.

## **II. The Clean Water Act Leaves the Manner of Implementation of the NPDES Program to the True Discretion of the Regional Board**

### **A. MS4 Requirements Are Flexible And Allow the Regional Board Discretion in Determining Specific Permit Provisions**

In its comment letter, the Regional Board provides a lengthy explanation of how it interprets the Clean Water Act to apply to the issues in these test claims. On the one hand, the Regional Board attempts to portray the Clean Water Act’s requirements as imposing specific,

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precedential nor final and believe its reasoning cannot be reconciled against the holdings in Long Beach Unified School District v. State of California (1990) 225 Cal.App.3d 155 or Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564. Thus, the Commission should not consider that decision nor the reasoning leading to that decision.

mandatory obligations on state permitting agencies like the Regional Board.<sup>3</sup> On the other hand, and in an implicit acknowledgment that the Commission has twice found that provisions like those at issue in these test claims are not specifically required, or even mentioned, in EPA's regulations, the Regional Board also argues that:

The CWA does not provide a specific set of permit requirements that the permitting agency must include in each MS4 permit. Rather, the NPDES permitting program mandates that the permitting agency exercise discretion and choose specific controls, generally BMPs, to meet a legal standard.<sup>4</sup>

There is no legal support for the Regional Board's position that Congress or the NPDES permitting regulations "mandates," as opposed to enables or authorizes, a State permitting agency to exercise discretion in the manner the Regional Board did here or choose the specific permit terms that are the subject of the test claims at issue.

Rather, federal authority establishes that the Regional Board has wide latitude in determining what provisions should be included in these permits and California's Courts likewise have previously acknowledged that the particular permit requirements may be driven by federal or state law.<sup>5</sup>

In Natural Resources Defense Council v. County of Los Angeles, et al., decided this summer, the Ninth Circuit considered cross-motions for summary judgment in a citizen suit action brought by environmental groups against MS4<sup>6</sup> operators for alleged permit violations.<sup>7</sup> While ultimately rejecting some of the permittees' argument regarding compliance determinations for MS4 permits, the court highlighted the vast discretion granted to the Regional Board under the Clean Water Act:

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<sup>3</sup> See, e.g., Regional Board Response, pp. 9-10 [citing C.F.R. provisions]; 20 ["the CWA as implemented by U.S. E.P.A.'s regulations creates a comprehensive regulatory strategy including very specific permit requirements that apply directly to local agencies' storm sewer discharges." Underlining added.].

<sup>4</sup> Regional Board Response, p. 9, underlining added.

<sup>5</sup> Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613, 620.

<sup>6</sup> MS4 means "municipal separate storm sewer system" under 40 CFR § 122.26(b)(19). Municipal separate storm sewer system is defined by 40 CFR § 122.26(b)(8) as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works as defined at 40 CFR 122.2.

<sup>7</sup> \_\_\_ F.3d \_\_\_ (9th Cir. 2011) 2011 U.S. App. LEXIS 14443.

Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges. [Citation.]<sup>8</sup>

The Ninth Circuit's decision in NRDC v. County of Los Angeles is merely the latest pronouncement from the federal judiciary about the broad discretion of storm water permitting agencies under the Clean Water Act. In 1999, the Ninth Circuit rejected arguments from environmental groups and permittee groups, respectively, that the Clean Water Act either requires MS4 permits to include strict numerical effluent limitations or prohibits the use of such limitations.<sup>9</sup> Instead, the court held that the permitting agency has broad discretion: "the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards."<sup>10</sup> In sum, the defining characteristic of the MS4 permitting program under the Clean Water Act is flexibility for the permit writer.

While admitting that Clean Water Act MS4 permitting rules are flexible and generic, the Regional Board nevertheless contends that all requirements of the MRP are mandated by federal law. In essence, the Regional Board argues that any and all requirements it includes in an NPDES permit are, by definition, required by federal law. Stated differently, the MRP can include anything the Regional Board says it can, without limitation, and still be a federal mandate. The Commission has previously rejected this argument,<sup>11</sup> and it is not supportable under the law.

As mentioned briefly above, California courts have recognized that NPDES permits issued by Regional Boards implement both state and federal law.<sup>12</sup> Moreover, in Burbank v. State Water Resources Control Board, the California Supreme Court pointedly declined to assume that all requirements in the NPDES permit at issue were required by federal law, and remanded the case to the superior court to determine whether the permit imposed effluent limitations more stringent than required by federal law.<sup>13</sup> Specifically, the Court noted "[w]hat is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement

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<sup>8</sup> *Id.*, at pp. 37-38, citing 55 Fed.Reg. 48,038, underlining added.

<sup>9</sup> Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159 [EPA was the permitting agency].

<sup>10</sup> *Id.*, at p. 1166.

<sup>11</sup> Statement of Decision; In Re Test Claim On San Diego Regional Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09 (March 26, 2010), p. 49 ["Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly."]

<sup>12</sup> Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613, 619-21.

<sup>13</sup> *Id.*, at p. 628

requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements.”<sup>14</sup>

Thus, it is already established by both the federal and state judiciaries that everything in the MRP is not required by the Clean Water Act just because, as the Regional Board suggests, the permit was issued generally under the NPDES program’s MS4 provisions. As Test Claimants will show, the MRP imposes standards that are not within the maximum extent practicable standard, and therefore are not required by the Clean Water Act.

### **B. The Maximum Extent Practicable Standard Itself Is Flexible And Dependent on Discretionary Determinations**

Under Clean Water Act section 402(p), NPDES permits issued to MS4 operators must “require controls to reduce the discharge of pollutants to the maximum extent practicable.”<sup>15</sup> The Regional Board contends that each and every provision of the MRP challenged in these test claims is mandated by federal law because all the permit provisions at issue are allegedly required to implement this “MEP” standard. Nevertheless, the Regional Board fails to support this broad-brush assertion with any evidentiary showing and, as set forth above, the Regional Board’s assertion has been previously rejected by the courts.<sup>16</sup> Furthermore, it is yet another example of how the Regional Board considers itself fully exempted from Section 6 of Article XIII of the California Constitution despite the Court of Appeal having struck down the Legislature’s prior attempt to institute such an exemption by statute.<sup>17</sup> Indeed, the Regional Board’s own description of the MEP standard could hardly be more vague, claiming expansive discretion for the State permit writer: according to the Regional Board, MEP “is an ever evolving, flexible, and advancing concept. . . .”<sup>18</sup>

While Claimants do not agree with the Regional Board that it has nearly boundless discretion to declare any and every permit term to be within the MEP standard, case law does acknowledge that the MEP standard can be “a highly flexible concept” that involves “balancing numerous factors.”<sup>19</sup>

However, given the fact that none of the specific permit provisions challenged in these test claims are expressly required under the Clean Water Act or EPA’s regulations and the lack of evidence, as opposed to arguments, in the record that these provisions were necessary to

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<sup>14</sup> Id.

<sup>15</sup> 33 U.S.C. § 1342(p)(3)(B)(iii).

<sup>16</sup> The Commission’s previous views on this issue have been contrary to those of the Regional Board and consistent with those of the courts. [San Diego Test Claim Decision], p. 49.

<sup>17</sup> County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898, 904.

<sup>18</sup> Regional Board Response, p. 10.

<sup>19</sup> Building Industry Association of San Diego County v. State Water Resources Control Board (2004) 124 Cal.App.4th 866, 889.

avoid an EPA veto of the State's permitting action, it is apparent that the Regional Board "freely chose" to implement these particular requirements.<sup>20</sup>

The Regional Board argues that "[s]uccessive permits issued to the stormwater dischargers... require greater levels of specificity over time in defining what constitutes MEP," and that this "iterative process" constitutes a federal requirement that forever increases the stringency of NPDES permits.<sup>21</sup> This position is misstated. While federal guidance supports an iterative approach, there is no statutory provision or Clean Water Act regulation which commands it. In addition, the Regional Board could have employed the iterative process by drafting the MRP to reflect the programs and procedures developed by the Test Claimants over the last permit term and have these programs and procedures refined based on Test Claimants' then available resources, which now are under even more pressure to be reduced due to the fiscal pressures faced by local governments. There is no evidence in the record that suggests such an incremental approach would have fallen short of federal requirements. In other words, if the Regional Board had proceeded by employing an iterative process in this manner, these test claims might not have been presented to the Commission.

In addition to its arguments about what is embraced within MEP, the Regional Board also contends that "this provision [i.e., Clean Water Act section 402(p)(3)(B)(iii)] requires that the San Francisco Bay Water Board, when appropriate, include provisions that go beyond MEP."<sup>22</sup> This is a misstatement of the law; the Clean Water Act allows or authorizes the Regional Board to include provisions that go beyond the MEP, but does not require it to so do. As explained above, under Defenders of Wildlife, it is clear that while the Clean Water Act does not prohibit the Regional Board from requiring strict compliance with water quality standards, it also has the discretion to not require such compliance.<sup>23</sup> Building Industry Association, cited by the Regional Board, does not hold to the contrary. As in Defenders of Wildlife, the court in Building Industry Association did not hold that the Regional Board is required to impose permit provisions more stringent than MEP. That was not the issue. Rather, petitioners in Building Industry Association argued that section 402(p)(3)(B)(iii) prohibits the Regional Board from imposing permit provisions more stringent than MEP.<sup>24</sup> That contention was rejected, and the Building Industry Association court held that "in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard. . . ."<sup>25</sup>

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<sup>20</sup> [San Diego Test Claim Decision], p. 55, citing Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564, 1593-94.

<sup>21</sup> Regional Board Response, p. 10.

<sup>22</sup> Id., at p. 11.

<sup>23</sup> Supra, 191 F.3d at p. 1166.

<sup>24</sup> Building Industry Association, supra, 124 Cal.App.4th at p. 880 ["Building Industry contends that under federal law the 'maximum extent practicable' standard is the 'exclusive' measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a 'maximum extent practicable' standard."].

<sup>25</sup> Id. at p. 884; see also City of Arcadia v. State Water Resources Control Board (2006) 135 Cal.App.4th 1392, 1429 ["In BIA, this court similarly held that 33 United States Code section 1342(p)(3)(B)(iii) does not divest a regional (footnote continued)"]

Test Claimants do not disagree with this conclusion, but do disagree with the Regional Board's contention that federal law requires, rather than enables, the state permitting agency to go beyond federal law, when appropriate. Instead, federal law allows the state permitting agency to impose requirements more stringent than federal law in appropriate situations, whereby the requirements become state mandates.

Throughout its response, the Regional Board insists that the MRP provisions at issue are required under federal law to control the discharge of pollutants to the MEP. However, no actual evidence has been presented in support of this argument. Other than asserting that MEP is "flexible, evolving and advancing," neither the Regional Board's Response nor the MRP itself provide a meaningful explanation of what MEP means for these Test Claimants in this permit. The Regional Board, in effect, asks everyone – the Commission, the Test Claimants, the public – to simply trust that it has properly applied the MEP standard and not exercised its discretion to go beyond it. In fulfilling its statutory obligation to decide test claims, the Commission must critically evaluate the Regional Board's assertions, as it has capably done before.

The Regional Board goes so far as to claim that Building Industry Association "demonstrates that the San Francisco Bay Water Board is entitled to considerable deference concerning its determination about the actions necessary to meet the federal minimum requirements."<sup>26</sup> The Court in Building Industry Association made no such determination regarding the meaning of MEP. Unlike the MRP, which defines MEP by repeating the language of section 402(p)(3)(B)(iii),<sup>27</sup> the San Diego Regional Board's permit in Building Industry Association attempted to provide a definition of MEP:

The federal maximum extent practicable standard is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit's definitions section. (See ante, fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning.<sup>28</sup>

This passage is significant for several reasons. First, it demonstrates that the "highly flexible" description of MEP came from the definition "in the Permit," not from EPA or

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board's discretion to impose an NPDES permit condition requiring compliance with state water quality standards more stringent than the maximum-extent-practicable standard."].

<sup>26</sup> Regional Board Response, p. 11.

<sup>27</sup> MRP, p. 122.

<sup>28</sup> 124 Cal.App.4th at p. 889.

the Clean Water Act. Second, and assuming arguendo that the Regional Board is correct that the definition of MEP from a different permit is applicable to the MRP, the Regional Board's response fails to explain how the very large costs associated with the MRP provisions at issue in these test claims – cost estimates for which there is no competing evidence in the record – are “practicable.”

Even the Regional Board's own quotation of Building Industry Association acknowledges that cost is a consideration to be balanced in determining the MEP standard. Similarly, the Regional Board's Response also includes a citation to statements from EPA in the Federal Register.<sup>29</sup> EPA listed many factors to be considered in determining MEP, including “current ability to finance the program.”<sup>30</sup> Thus, the Regional Board's authority recognizes that at some point, costs can rise to a level such that the pollution controls under consideration exceed the MEP. The costs imposed by the MRP provisions at issue in these test claims have eclipsed this point. For the trash control provisions alone, the two year costs imposed by the MRP are \$8,002,801 for San Mateo County jurisdiction and \$7,193,871 for Alameda County jurisdictions, or \$15,196,672 in both counties combined. At the same time the Test Claimants are being forced to bear these costs, the country and California are undergoing historic financial hardships. The fact that Test Claimants “current ability to finance the program” is significantly diminished as a result cannot be disputed. In light of these authorities and facts, it is apparent the MRP imposes obligations that exceed the MEP.

For example, it is clear that the trash control provisions were developed without any regard to practicability. The trash control provisions were all designed to reduce trash loads from the MS4 by 100% by 2022.<sup>31</sup> The 40% trash reduction at issue in these test claims is simply an arbitrary step in phased reductions toward that ultimate 100% reduction goal. Any suggestion that the MRP's trash control provisions were developed to implement the MEP is belied by the plain language of MRP Provision C.10. Rather, the trash control provisions were developed to achieve the Regional Board's water quality policy objectives that go beyond MEP and federally-imposed requirements.

### **C. The Clean Water Act Does Not Require California To Issue NPDES Permits Or Dictate Exactly What Its Permits Should Contain**

The Regional Board argues that the use of the word “shall” in Clean Water Act section 402(p)(3)(B)(iii) and Code of Federal Regulations, title 40, part 122.44(d)(1)(vii)(B), “mandate that the permitting agency comply with all of those mandates.”<sup>32</sup> This point is unavailing for the purposes of these test claims on several grounds. First, and foremost, as the

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<sup>29</sup> Regional Board Response, p. 10, quoting Letter from Alexis Strauss to Tam Doduc and Dorothy Rice, April 10, 2008 [quotation from letter includes partial quotation of a different portion of the same passage in the Federal Register].

<sup>30</sup> 64 Fed. Reg. 68722, 68754 (Dec. 8, 1999).

<sup>31</sup> MRP Provision C.10, p. 84.

<sup>32</sup> Regional Board Response, p. 10.



Commission has previously found, California has voluntarily chosen to administer the NPDES program, and therefore it clearly has a choice as to whether any permit condition should be imposed.<sup>33</sup> Second, the term “shall” referred to in each case simply tells the permit writer to comply with general and non-specific permit requirements, such as the requirement to include controls to reduce the discharge of pollutants to the MEP. The Clean Water Act does not require a specific provision to be included in NPDES permits. Rather, the Clean Water Act allows the permitting agency to include specific provisions. Accordingly, the Regional Board is not required to include any particular controls; it exercises its discretion in how to implement the federal program and also exercises its discretion under state law to go beyond it. Those provisions that go beyond the actual requirements of the Clean Water Act, even if consistent with federal guidance, constitute reimbursable state mandates.

**D. Most of the Test Claims Are Unrelated to the TMDL Program, Which Also Allows Considerable Flexibility to the Regional Board in Determining Implementation**

In its response, the Regional Board provides considerable discussion of the Total Maximum Daily Load (TMDL) program,<sup>34</sup> primarily in relation to the applicability of Code of Federal Regulations, title 40, section 122.44(d)(1)(vii)(B).<sup>35</sup> It is important to note that TMDLs directly relate only to a small number of the MRP provisions at issue in these test claims, specifically, those provisions relating to Mercury and PCB diversion studies under MRP Provisions C.11.f and C.12.f.

Moreover, section 122.44(d)(1)(vii)(B) does not require that MS4 permits include Mercury and PCB diversion studies as set forth in MRP Provisions C.11.f and C.12.f. Rather, that regulation provides only generally that water quality-based effluent limitations in a permit must be “consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA.” Developing permit conditions that are consistent with wasteload allocations (a component of TMDLs) is but another exercise of discretion by the Regional Board. There are many different permit conditions that could be developed, all of which could be consistent with a wasteload allocation.

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<sup>33</sup> [San Diego Test Claim Decision], p. 39 [“Based on this statute [Wat. Code, § 13370], in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen to effect the stormwater permit program.” citing *Hayes*, *supra*, 11 Cal.App.4th at 1193-94, footnote omitted].

<sup>34</sup> “A TMDL defines the specified maximum amount of a pollutant which can be discharged or ‘loaded’ into the waters at issue from all combined sources.” *City of Arcadia*, *supra*, 135 Cal.App.4th at p. 1404, quoting *Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520. A TMDL is defined as the sum of “wasteload allocations” for point sources of pollution, “load allocations” for non-point sources of pollution and natural background sources of pollution. 40 C.F.R. § 130.2(g),(h), & (i).

<sup>35</sup> Regional Board Response, pp. 10, 12-15.

Further, the MRP diversion studies for Mercury and PCBs are contemplated by implementation plans for the various TMDLs, not the wasteload allocations themselves. Implementation plans for TMDLs are developed under state law (Wat. Code, § 13242), not federal law. Neither Clean Water Act section 303(d)<sup>36</sup> nor Code of Federal Regulation, title 40, part 130.2, requires TMDL implementation plans. By contrast, TMDLs adopted by EPA itself do not include implementation plans. In fact, EPA previously expressly declined to require that TMDLs include implementation plans or that implementation plans for TMDLs be subject to EPA approval.<sup>37</sup> Therefore, none of the TMDL-related issues in these test claims (Mercury and PCBs) can properly be characterized as federal mandates. TMDLs do not directly relate to any of the other test claims.

### **III. The Challenged Provisions Impose New Programs And/Or Higher Levels of Existing Service**

As stated in the Test Claimants' original narrative statements, the MRP provisions at issue impose new programs and/or higher levels of service not mandated under the Clean Water Act. The Regional Board asserts that "[m]any of the provisions are very similar to those in Claimants' prior permits or to those in plans that Claimants' prior permits required that they implement."<sup>38</sup> However, "very similar" is not the standard. Although some, but certainly not most, of the challenged permit provisions may relate to prior requirements or fall within the same general categories, they are not even close to being the same, and the Regional Board ultimately admitted this.<sup>39</sup>

In this regard, it is highly significant that the Regional Board utterly fails to address the evidence Test Claimants submitted, or offer any contrary evidence, regarding the estimated costs required to comply with the new programs and higher levels of service at issue. The issue before the Commission is not to decide whether two permits are vaguely similar. Rather, the Commission must decide whether the new permit imposes a new program or higher level of service that requires the test claimant to expend more than \$1,000.00 than was previously required.<sup>40</sup>

As the undisputed evidence submitted with the test claims establishes, the MRP requires Test Claimants to expend considerably more than \$1,000.00 for the new programs and higher levels of service at issue. The Test Claimants provided evidence to the Commission showing that in order to comply with the MRP provisions at issue in the test claims an additional \$7,608,992 for FY 2010-2011 and \$8,305,521 for FY 2011-2012 will be required to

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<sup>36</sup> 33 U.S.C. § 1313(d).

<sup>37</sup> See Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13608 (Mar. 19, 2003).

<sup>38</sup> Regional Board Response, p. 16

<sup>39</sup> *Id.* The term similar implies that the two permits are not identical.

<sup>40</sup> Government Code § 17564(a) requires claims to exceed \$1,000.00 before they can be submitted to the Commission for reimbursement.

be expended for Alameda County Claimants and an additional \$6,643,701 for FY 2010-2011 and \$8,646,139 for FY 2011-2012 will be required to be expended for San Mateo County Claimants.

#### **IV. The MRP Provisions at Issue in the Test Claims Are Not Voluntary Programs**

The Regional Board correctly states that the Commission, in reliance on Department of Finance v. Commission of State Mandates (Kern High School Dist.), previously decided that because the claimants were required to apply for an NPDES permit under state law, Kern High School District did not apply, and therefore the challenged permit provisions were reimbursable state mandates.<sup>41</sup> The Regional Board now requests the Commission overrule its previous decision, arguing that because federal and state law do not “require that parties discharge to waters of the Unites States,” Test Claimants therefore voluntarily discharge stormwater.<sup>42</sup> The Regional Board’s argument is specious, as it misconstrues the nature of these test claims, controlling law and the underlying facts.

Kern High School District discussed whether two statutes, which required school site councils or advisory committees to provide notice and agenda requirements for meetings, constituted reimbursable state mandates.<sup>43</sup> The California Supreme Court decided that the new requirements were not state mandates even though they constituted a new program or higher level of service. It reasoned that because the underlying programs requiring mandated notice and agenda requirements were voluntary, such new requirements could not be considered reimbursable state mandates because the schools could easily avoid the costs associated with the new program or higher level of service by simply not participating in the voluntary program to begin with.

The Kern High School District reasoning does not apply to these test claims. The Regional Board’s suggestion that the Test Claimants voluntarily choose to let precipitation run off the streets and sidewalks of Alameda and San Mateo Counties is not based on reality and is hardly worthy of a response. The Regional Board’s suggestion that Test Claimants “have the discretion to require on-site containment of stormwater runoff or to convey their stormwater runoff to a publicly owned treatment works”<sup>44</sup> is a grand factual contention with potentially far-reaching consequences, without any evidentiary support in the record for this broad assertion. The Regional Board has made no showing that such alternatives are even remotely possible. In Kern High School District, the schools had an option whereby no funds would need to be expended; they could simply decide not to participate in the

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<sup>41</sup> Ibid., citing San Diego Decision, p. 34.

<sup>42</sup> Id. at 17

<sup>43</sup> Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727, 730.

<sup>44</sup> Regional Board Response, p. 17, fn. 83.

program and thus not comply with the notice requirements.<sup>45</sup> However, the Test Claimants have no similar options.

## V. The Permit Imposes Requirements And Mandates Unique to Local Agencies And Peculiar to Government

The Regional Board states that the challenged MS4 permit provisions are not state mandates because the MRP allegedly does not impose requirements unique to local governments.<sup>46</sup> Specifically, the Regional Board asserts that the NPDES permit program, including the requirements the program imposes, is not peculiar to local government because the program is imposed upon industrial and construction facilities.<sup>47</sup>

The Regional Board is again factually incorrect and it misinterprets the law it cites. To support its position, the Regional Board relies on City of Richmond v. Commission on State Mandates.<sup>48</sup> However, in that case, the court specifically stated “the issue is whether costs unrelated to the provisions of public service are nonetheless reimbursable costs of government, because they are imposed on local governments ‘unique[ly],’ and not merely as an incident of compliance with general laws.”<sup>49</sup> Unlike City of Richmond, the specific requirements at issue here, such as POTW diversion and trash requirements, are not the same as and are very different from those imposed on businesses through the State’s construction and general industrial stormwater permit, but rather are costs related to the provisions of public service.

City of Richmond concerned a state mandated worker’s compensation provision.<sup>50</sup> The Commission originally denied the test claim, stating that workers compensation laws are laws of general application, and therefore are not subject to the provisions of section 6 of article XIII B of the California Constitution.<sup>51</sup> In agreeing with the Commission’s decision regarding the mandate, the court noted that

State and local governments... had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation... By doing so, it may have imposed a requirement ‘new’ to local agencies, but that requirement was not ‘unique.’<sup>52</sup>

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<sup>45</sup> Department of Finance, 30 Cal.4th at 753.

<sup>46</sup> Regional Board Response, p. 24

<sup>47</sup> Id.

<sup>48</sup> (1998) 64 Cal.App.4th 1190.

<sup>49</sup> Id. at 1197-1198, underlining included.

<sup>50</sup> Id. at 1193.

<sup>51</sup> Id. at 1194.

<sup>52</sup> Id. at 1198.

Accordingly, as the worker's compensation mandate was federal, and because it applied not only to public employers, but rather to all employers, a reimbursable state mandate was not created.<sup>53</sup> Lifting the exemption did not make the law a reimbursable state mandate.<sup>54</sup>

The Regional Board also suggests that the MRP is not a reimbursable state mandate because NPDES stormwater rules are allegedly laws of general application.<sup>55</sup> The MRP clearly is not a "general law." Instead, Claimants contend, and the Commission in the past has agreed, that the MRP applies only to the entities bound by it.

The Commission addressed this argument in both of its prior stormwater Test Claim Decisions.<sup>56</sup> Specifically, the Commission noted that the challenged provisions of the MS4 permit apply only to the local agencies named in the permit:

The permit lists no private entities as 'permittees.' Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County... Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.<sup>57</sup>

Accordingly, the Commission has previously heard, and rejected, the argument put forth by the Regional Board that the MRP is a law of general application. Instead, the MRP applies only to the public agencies named as permittees.

The Ninth Circuit recognized that MS4s are regulated differently from industrial discharges in Defenders of Wildlife.<sup>58</sup> The Court opined that although it is apparent that "Congress expressly required industrial storm-water discharges to comply with the requirements of 33 U.S.C. § 1131... Congress chose not to include a similar provision for municipal storm-sewer discharges."<sup>59</sup>

## **VI. The MRP Provisions At Issue Exceed Federal Law And the Regional Board Has Shifted the Burden onto the Local Governments**

The Regional Board contends that the central issue before the Commission is whether the challenged permit provisions exceed the federal mandate for NPDES permits.<sup>60</sup> Test

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<sup>53</sup> Id. at 1199.

<sup>54</sup> Ibid.

<sup>55</sup> Regional Board Response, p. 24.

<sup>56</sup> Statement of Decision, In Re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 (July 31, 2009), p. 48-49; [San Diego Test Claim Decision], p. 35-37.

<sup>57</sup> [Los Angeles Test Claim Decision], p. 48.

<sup>58</sup> Defenders of Wildlife v. Browner (9<sup>th</sup> Cir. 1999) 191 F.3d. 1159.

<sup>59</sup> Id. at 1164-1165, underlining included.

<sup>60</sup> Regional Board Response, p. 17

Claimants agree that this is a central issue. Reduced to its most basic formulation, the Regional Board's argument is that the MRP is a federal mandate because the Clean Water Act requires the MS4 permits to reduce the discharge of pollutants to the MEP. The Regional Board contends – without providing any evidence – that all MRP provisions at issue in these test claims are necessary to achieve MEP, so, in its view, any and all of these provisions are allegedly federal mandates and not state mandates.<sup>61</sup> For reasons already discussed, and more fully explained below, this contention is incorrect.

The Regional Board acknowledges that the Commission has recently decided two other test claims relating to NPDES permits in Los Angeles and San Diego Counties, and that in both cases NPDES permit provisions were found to have imposed unfunded state mandates.<sup>62</sup> The Regional Board does not suggest that the Clean Water Act or its regulations have changed since the Commission decided the Los Angeles and San Diego test claims. Instead, the Regional Board asks the Commission to reconsider its approach and in effect to decide that it erred in deciding the Los Angeles and San Diego test claims.<sup>63</sup> At the threshold, it should be noted that it is undisputed by the Regional Board that the MRP requires the Test Claimants to do more than they were required to do previously, that the estimated costs associated with the new requirements are substantial, and that the Regional Board has not provided evidence to dispute the magnitude of these estimated new costs, but purely relies on the assertion that the costs are de minimus. Instead, the Regional Board asks the Commission to “reconsider its approach”<sup>64</sup> to Long Beach Unified School District v. State of California<sup>65</sup> and Hayes v. Commission on State Mandates.<sup>66</sup>

The Regional Board labors to try to distinguish Long Beach, but cannot avoid the fact that the case actually supports Test Claimants' position. In Long Beach, the plaintiff school district sought subvention for additional costs it incurred to comply with regulations issued by the Department of Education.<sup>67</sup> Because the regulations were found to go beyond what was required by constitutional and case law requirements, and though the regulations were consistent with “suggestions” in case law, the court found there was a state mandated higher level of service.<sup>68</sup> As is the issue before the Commission, the distinction between federal requirements and guidance was key: “Where courts have suggested that certain steps and approaches may be helpful, the [regulations] and guidelines require specific actions.”<sup>69</sup>

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<sup>61</sup> Id. at 18.

<sup>62</sup> [Los Angeles Test Claim Decision]; [San Diego Test Claim Decision].

<sup>63</sup> Regional Board Response, p. 19.

<sup>64</sup> Ibid.

<sup>65</sup> Long Beach Unified School District v. State of California (1990) 225 Cal.App.3d 155.

<sup>66</sup> Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564.

<sup>67</sup> 225 Cal.App.3d at pp. 163-64.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid. italics in original.

In an attempt to distinguish this holding, the Regional Board argues that unlike the general obligations in Long Beach, the Clean Water Act and EPA regulations include “very specific permit requirements that apply directly to local agencies’ storm sewer discharges.”<sup>70</sup> However, this simply is not true with respect to the requirements the Test Claimants have put at issue, and, accordingly, the Regional Board has offered no relevant legal citation in support of its contention. In fact, it is abundantly clear that there are no “very specific requirements” in the Clean Water Act or EPA’s regulations that require the MRP provisions the Regional Board seeks to impose. In sum, Long Beach is and remains controlling authority, directly on point: when the Regional Board exercised its discretion under the Clean Water Act to translate general federal obligations and suggestions into specific state-imposed requirements, it went beyond what federal law requires and imposed state mandates.

Long Beach also undermines the Regional Board’s assertion that by applying EPA guidance, and accepting the support of EPA staff in comment letters, it imposed only a federal mandate. It is indisputable that EPA guidance, not adopted in rulemaking proceedings, and letters from EPA staff, do not have the force of law.<sup>71</sup> Hence, they are at best suggestions. As stated by the Court in Long Beach, “the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.”<sup>72</sup>

The Regional Board further tries to discredit the Commission’s previous approach by stating the Commission “[applied the] Long Beach holding to the wrong federal mandate.”<sup>73</sup> The Regional Board argues that the fact that the EPA allowed the State of California to become involved in the permitting process does not alter the federal nature of the NPDES permit requirements.<sup>74</sup> Instead, the Regional Board contends the only federal mandate that could be at issue is the mandate to obtain the NPDES permit.<sup>75</sup> This contention lacks merit. Federal law does not require the Regional Board to administer the NPDES permit; the State of California took that burden upon itself voluntarily. The Regional Board reasons that “the federal court decisions [in Long Beach] required no additional state involvement in order to” apply to the school districts. That is true, and exactly like the NPDES program. The NPDES program requires no additional state involvement to apply to the Test Claimants, but because the state voluntarily chose to administer the program, exercising discretion in the implementation and imposition of requirements beyond what is required by the Clean Water Act, a state mandate has resulted in terms of the requirements at issue.

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<sup>70</sup> Id.

<sup>71</sup> See, e.g., City of Arcadia, supra, 135 Cal.App.4th at 1429-30 [EPA guidance on TMDLs and NPDES permitting not binding].

<sup>72</sup> 225 Cal.App.3d at 173.

<sup>73</sup> Id. at 20.

<sup>74</sup> Id. at 20-21.

<sup>75</sup> Id. at 20.

The Regional Board also erroneously asserts that in its past decisions the Commission misapplied the holding in Hayes.<sup>76</sup> In Hayes, the plaintiff school districts and county offices sought reimbursement for providing full and formal due process procedures and hearings to pupils and parents regarding special education assessment, placement and education of special needs children.<sup>77</sup>

The Third District Court of Appeal<sup>78</sup> decided that the issue of reimbursement revolved on whether implementation of the federal program was within the state's discretion.<sup>79</sup> The court in Hayes opined that:

When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from the local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state has no "true choice" in the manner of implementation of the federal mandate. [¶] This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state. ... If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government.<sup>80</sup>

As the Commission has correctly recognized previously, since California voluntarily decided to implement the NPDES program itself, the manner of implementation of the NPDES program was left to the true discretion of the state and it freely chose to impose the costs at issue in these test claims through the MRP. In addition, even if this was not the case, as set forth above, the requirements that are the subject of the test claims here substantially exceed those imposed under the Clean Water Act and its implementing regulations and reflect free choices made by the Regional Board using its state law-based authorities.

## VII. The Test Claimants Have Exhausted Their Administrative Remedies

The Regional Board claims that the Test Claimants have not exhausted their administrative remedies, and therefore cannot collaterally attack the validity of the permit through the Commission proceeding.<sup>81</sup> In support of this position, the Regional Board cites Farmers

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<sup>76</sup> Id. at 21.

<sup>77</sup> Hayes, supra, 11 Cal.App.4th at 1574.

<sup>78</sup> Although the Regional Board several times refers to Hayes as a decision of the California Supreme Court, it was actually decided by the Third District Court of Appeal. See Regional Board Response, pp. 21-22.

<sup>79</sup> Id. at 1593.

<sup>80</sup> Id. at 1593-94, underlining added.

<sup>81</sup> Regional Board Response, p. 25.



Ins. Exchange v. Superior Court.<sup>82</sup> However, Farmers is not on point, nor does it support the position of the Regional Board.

Farmers concerned an action brought by an insurer in the Superior Court.<sup>83</sup> The insurer believed that under the doctrine of “primary jurisdiction” an action could only be heard in a court proceeding after the issue was ruled upon by the administrative agency, which in Farmers was the Department of Insurance.<sup>84</sup> The Commission, however, is the proper body to hear and decide this matter because the Legislature accorded it primary jurisdiction to address unfunded mandates.

The Commission was legislatively granted the authority to determine whether the permit constitutes a state mandate, and therefore the test claim is being heard in the proper forum. Indeed, under Government Code section 17552, these test claim proceedings “shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.” The Regional Board and State Water Resources Control Board do not have statutory power to determine if a permit provision is a state mandate or not.

Moreover, the Commission’s enabling legislation indicates that is vested with jurisdiction to resolve all issues presented in these test claims. The purpose of the Commission is to “resolve questions as to whether a statute imposes ‘state-mandated costs on a local agency within the meaning of section 6’ [citation].”<sup>85</sup> Accordingly, Test Claimants are in fact exhausting their administrative remedies by bringing forth the test claim in front of the Commission on State Mandates.

### **VIII. The Challenged Permit Provisions Financial Obligations Are Not De Minimus**

The Regional Board asserts that even if the challenged provisions are found to be state mandates, they are not reimbursable because they are allegedly costs incidental to implementing the NPDES permit, and as such are de minimus.<sup>86</sup> The Regional Board offers no evidence for this conclusory and inaccurate position, but rather relies solely on San Diego Unified School District v. Commission on State Mandates (2004) 33 Cal.4th 859,<sup>87</sup> which involved costs associated with constitutional due process hearings after California had enacted requirements for all school expulsion hearings, and further required expulsion hearings for certain actions taken by students, such as bringing a firearm to school grounds. Although the San Diego Unified School District court did not discuss its reasoning, it stated

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<sup>82</sup> Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377

<sup>83</sup> Farmers, 2 Cal.4th at 381-382.

<sup>84</sup> Id. at 390.

<sup>85</sup> California School Boards Association v. State of California (2011) 192 Cal.App.4th 770, 780-781.

<sup>86</sup> Regional Board Response, p. 25

<sup>87</sup> Id.

that because the expulsion requirements “were merely incidental to the federal rights codified by the statute, and their ‘financial impact’ was de minimus,” the costs were not reimbursable state mandates.

San Diego Unified School District also included a footnote, which is highly pertinent here:

We do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than “incidental” or “de minimis” expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.

The large undisputed expenditures at issue in these tests claims comprise the facts contemplated by the court’s footnote, as shown in the figures cited by the Test Claimants. The court in San Diego Unified School District never discussed the amount of the costs, which Test Claimants have demonstrated as being significantly over the Commission \$1,000.00 threshold. Under California Code of Regulations, title 2, section 1184.10, costs over \$1,000.00 are not de minimus. As Test Claimants figures show, they have easily surpassed this amount, and with there being no evidence in the record to the contrary, the Regional Board’s argument should be rejected.

#### **IX. Test Claimants Do Not Have Authority to Levy Service Charges, Fees or Assessments to Pay for the Programs at Issue in the Test Claims**

The Regional Board takes the untenable position that “the local agencies possess fee authority within the meaning of section 17556, subdivision (d), of the Government Code such that no reimbursement by the state is required.”<sup>88</sup> In addition to being conclusory and unsubstantiated, this position is directly contrary to the Commission’s San Diego decision. The San Diego decision analyzes the various requirements imposed on local governments by Proposition 218, and in particular the majority-protest and voter-approval requirements for “property related fees.” The Commission properly concluded that an agency does not have “sufficient fee authority” if its fee authority is contingent upon either voter approval or the result of a property owner protest.<sup>89</sup> In its discussion of fee authority, the Regional Board fails to acknowledge the San Diego decision. Further, the Regional Board apparently finds itself unable to directly acknowledge Proposition 218’s existence, despite its prominent place in the Test Claimants initial filing, noting only that “there may be limitations concerning the percent of voters or property owners who must approve assessments under California law.”<sup>90</sup>

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<sup>88</sup> Regional Board Response, p. 24.

<sup>89</sup> [San Diego Test Claim Decision], pp. 106, 115.

<sup>90</sup> Regional Board Response, p. 24.

The Regional Board fails to rebut the claimants' detailed assertions that claimants lack fee authority to pay for each of the mandated programs. The Test Claimants' Narrative Statement explains that most conceivable fees to fund stormwater programs would be considered "property related fees" and therefore subject to Proposition 218's majority protest and voter-approval requirements and identifies a narrow class of targeted regulatory fees that would possibly not be subject to Proposition 218's requirement.<sup>91</sup> The Narrative then goes on to evaluate the potential to impose fees that might be imposed to fund each of the MRP's requirements.<sup>92</sup> In each case, the Narrative concludes that only a fee subject to Proposition 218 would be adequate to pay for the programs required by the provisions.

In an apparent attempt to respond to these assertions, the Regional Board states that the claimants have the authority "to charge businesses to cover inspection costs" and that local agencies "can and do assess fees on residents and businesses to fund their storm water programs."<sup>93</sup> Test Claimants acknowledge both of these points, but neither means that the claimants have the authority to levy fees to pay for the particular mandates at issue here. None of the mandates in these test claims involve or relate to funding for the inspection of businesses; such mandates have not been challenged. Similarly, Test Claimants have not challenged requirements, such as those applying to new development, that can be funded by fees that are not subject to Proposition 218. The assertion that some local agencies fund stormwater programs with fees on residents and businesses is not supported by any evidence and does not relate to issues raised by test claimants. In any event, if true, it would prove little since such fees could predate Proposition 218's enactment in 1996 and since the programs funded by such fees are not necessarily the same as those at issue in these test claims.

Finally, the limitations on fee authority discussed in the San Diego decision and the Narrative have increased since the filing of the test claim. At the November 2010 General Election, the voters approved Proposition 26. By amending the definition of "tax" in Article XIII C of the California Constitution, it subjects any local government "levy, charge, or exaction of any kind" to voter approval unless it meets one of the seven listed exceptions.<sup>94</sup> The listed exceptions include assessments and property related fees imposed under Proposition 218. The other relevant exceptions further narrow the fee authority of local governments.<sup>95</sup> Thus, it is even more certain now than it was when the test claim was filed that claimants would not have adequate authority to impose a levy to pay for the mandated programs.

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<sup>91</sup> City of Alameda Test Claim Narrative, pp. 10–11; City of Brisbane Test Claim Narrative, pp. 9-10.

<sup>92</sup> See City of Alameda Test Claim Narrative, pp. 29-30 [Provision C.8], 37-38 [Provision C.10], 40–41 [Provisions C.11.f and C.12.f]; See also City of Brisbane Test Claim Narrative, pp. 24 [Provision C.8], 30-32 [Provision C.10], 34 [Provisions C.11.f and C.12.f].

<sup>93</sup> Regional Board Response, p. 24.

<sup>94</sup> See Cal. Const., art. XIII C, § 1, subd. (e).

<sup>95</sup> See id., art. XIII C, § 1, subds. (e)(1)–(e)(3).

## **X. Rebuttal to Comments Regarding Specific Permit Provisions**

### **A. Provision C.8 is a Program That Requires a Higher Level of Service**

MRP Provision C.8 implements water quality monitoring programs. Test Claimants do not dispute the importance of these monitoring programs in general. However, the mere importance of monitoring programs does not permit the Regional Board to supplement the federally required monitoring program requirements, and then claim these additions are not state mandates.

The Regional Board argues that comparing the previous MS4 permits to the MRP is not the correct approach to identify reimbursable mandates, and readily admits that the MRP “may in some instances require higher levels of service.”<sup>96</sup> Nevertheless, the Regional Board’s primary argument in essence is that prior MS4 permits allegedly included the same monitoring requirements as the MRP.<sup>97</sup>

The Regional Board cites authorities that discuss the importance of monitoring provisions in NPDES permits.<sup>98</sup> These cases simply reinforce the federal requirement that NPDES permits include a monitoring program, as opposed to not having a monitoring program at all.<sup>99</sup> Again, this point is not in dispute. Test Claimants agree the MRP should have a monitoring program. Ultimately, the cases cited by the Regional Board do nothing to support its contention that the particular monitoring provisions at issue here were required by federal law.

Accordingly, as Test Claimants, along with the Regional Board,<sup>100</sup> note the higher level of service required by the MRP’s monitoring requirements, the contested portions of MRP Provision C.8 are new programs or higher levels of service.

#### **1. C.8.b – San Francisco Estuary Receiving Water Monitoring**

MRP Provision C.8.b requires Test Claimants to participate in implementing an Estuary Receiving Water Monitoring Program at a minimum equivalent to the San Francisco Estuary Regional Monitoring Program for Trace Substances (“RMP”), and requires Test Claimants to pay their “fair-share” of the costs of the monitoring program.

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<sup>96</sup> Regional Board Response, p.28.

<sup>97</sup> *Id.*

<sup>98</sup> Regional Board Response, p. 28, citing Natural Resources Defense Council v. County of Los Angeles (9th Cir. 2011) 636 F.3d 1235 [prior opinion, but not substantively different on this point], Sierra Club v. Union Oil Co. (9th Cir. 1987) 813 F.2d 1480, and Environmental Defense Center v. EPA (9th Cir. 2003) 344 F.3d 832.

<sup>99</sup> See Natural Resources Defense Council v. County of Los Angeles (9th Cir. 2011) 636 F.3d 1235, Sierra Club v. Union Oil Co. (9th Cir. 1987) 813 F.2d 1480, and Environmental Defense Center v. EPA (9th Cir. 2003) 344 F.3d 832.

<sup>100</sup> Regional Board Response, p.28. Specifically, the Regional Board states “[t]he challenged Provisions C.8 requirements ... may in some instances require higher levels of service.”

The Regional Board argues the new requirement is equivalent to the prior permit, and accordingly was intended to require the same level of monitoring.<sup>101</sup> However, the Regional Board's argument is not supported by the facts.

Over the past two years, the RMP has begun a Master Planning process which involves stronger Steering Committee direction on special studies as well as revisions to the ongoing Status and Trends program that is subject to MRP Provision C.8.b.<sup>102</sup> As a result, over 10 subgroups and strategy teams have been added to the original RMP oversight structure of two committees and four workgroups.<sup>103</sup> This has resulted in additional needs for representation and participation by stormwater program staff, and Test Claimants must expend additional funds in order to comply.<sup>104</sup>

For example, to comply with the prior permit, the Alameda County Claimants had staff attend approximately two to three RMP meetings per year.<sup>105</sup> The number of attended meetings has now doubled as a result of the increase in RMP oversight groups.<sup>106</sup> As Test Claimants must provide staff to attend these meetings, additional funds must be expended.<sup>107</sup> This results in an additional funding need to be added to the Alameda County claimants' budget.

The Regional Board attempts to respond to Test Claimants' statements that they must comply with the increased burden of the RMP program by arguing that Test Claimants are not in fact required to comply with the RMP program, but rather can comply with an alternative program that is equivalent to the RMP.<sup>108</sup> Although the Regional Board is correct that the MRP allows Test Claimants to develop an alternative to the RMP, this argument misses the point. Complying with either the new RMP or an equivalent program would require Test Claimants to incur substantially increased costs and develop new programs to comply with the higher level of service required by the State through the MRP.<sup>109</sup> Because any alternative program would have to be "at a minimum equivalent" to the RMP, the burden of complying with an alternative program would necessarily increase "at a minimum" by the same amount as the increased burdens associated with the RMP.

Thus, it is simply irrelevant, as the Regional Board contends, that provision C.8.b "is intended to maintain the same level of monitoring that Permittees have been addressing"

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<sup>101</sup> Id., at p.30.

<sup>102</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 2.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 2.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Regional Board Response, p.30.

<sup>109</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 2; Exhibit E to 2011 Declaration of James Scanlin, ¶ 2.

under prior permits<sup>110</sup> because intent is not the test and, in any event, the level being required is not the same, it is substantially greater.<sup>111</sup> Accordingly, Test Claimants continue to submit that MRP Provision C.8.b is a new program or higher level of service.

## 2. C.8.c. – Status Monitoring/Rotating Watersheds

MRP Provision C.8.c requires Test Claimants to conduct annual status monitoring in local receiving waters using sampling site frequencies and methodologies set forth in the MRP.

The Regional Board argues that MRP Provision C.8.c does not require a higher level of service.<sup>112</sup> In support, the Regional Board states the prior permit required Test Claimants to “assess beneficial uses using appropriate physical, chemical and biological parameters in representative receiving waters,” although the term “status monitoring” was not specifically used.<sup>113</sup>

However, beyond this sweeping generalization, the Regional Board provides no evidence to support its contention. Test Claimants have demonstrated that the prior permits required a much lower level of effort and were not equivalent to the MRP, either in number of sites or in level of effort per site.<sup>114</sup> Specifically, the Alameda County Claimants must increase the annual number of Biological Assessment sampling sites required by almost 50%, from an average of 14 under the prior permit to 20 under the MRP.<sup>115</sup> Similarly, the San Mateo County Claimants must increase the number of Biological Assessment sampling sites required by approximately 26%, from an average of 4.8 under the prior permit to 6 under the MRP.<sup>116</sup> While the Test Claimants previously used a protocol for Bioassessment that was limited to collection of one benthic macroinvertebrate sample and completion of a two page visual assessment for 10 physical habitat attributes of the overall sampling area, the MRP requires an expanded Surface Water Ambient Monitoring Program (SWAMP) protocol which additionally requires collection and processing of four different types of algae samples as well as collection of water samples for nutrients and other ancillary parameters.<sup>117</sup> The SWAMP protocol also requires quantitative measurements or scoring for over 20 different physical habitat parameters at each of 10 or more individual transects within each site.<sup>118</sup>

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<sup>110</sup> Regional Board Response, p.31.

<sup>111</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 2; Exhibit E to 2011 Declaration of James Scanlin, ¶ 2.

<sup>112</sup> Regional Board Response, p.32-33.

<sup>113</sup> *Id.*, at p.31.

<sup>114</sup> See MRP Table 8.1 and associated footnotes; Exhibit E to 2011 Declaration of James Scanlin, ¶ 3.

<sup>115</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 3.

<sup>116</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 3.

<sup>117</sup> *Id.*; Exhibit E to 2011 Declaration of James Scanlin, ¶ 3.

<sup>118</sup> *Id.*

These expanded field measurements are to be recorded on a 26 page set of SWAMP field forms.<sup>119</sup>

Under the prior permit's protocol, Test Claimants' each employed a two-person bioassessment team that typically sampled 4 to 6 sites per day, while the new MRP protocol requires at least 4 to 6 hours for a three to four person team to complete one site.<sup>120</sup> Laboratory processing and analysis of the four algae samples is a new cost of approximately \$500 per site for the taxonomy and another \$100 for chlorophyll and ash-free dry mass, while the macroinvertebrate laboratory processing costs alone are \$325 per site.<sup>121</sup>

Additionally, Test Claimants are required to sample for parameters not previously required, and some of these require additional field visits separate from the bioassessment sampling conducted in spring.<sup>122</sup> Specifically, toxicity in the water column requires part of the effort to be done as a separate sampling event during a storm; for this test the MRP adds a fourth-species test to the U.S. EPA standard three-species test, which will thereby increase the volume of water that must be collected for sampling, requiring increased costs for handling and transporting to the toxicity laboratory.<sup>123</sup> Similarly, the MRP also requires the Alameda County Claimants to visit three sites on two separate occasions each year to collect bedded sediment samples, where previously this method had only been used for special studies.<sup>124</sup> The MRP further requires separate sediment samples for pollutant analysis and toxicity testing, whereas the prior monitoring work plan required only a few of the pollutant analyses required by the MRP, and did not include sediment toxicity testing.<sup>125</sup> The cost of toxicity testing is approximately \$100 per sample while additional chemical analyses required by the MRP also add costs of \$1,500 per sample.<sup>126</sup>

In addition to the above noted new and augmented sampling parameters, the methods for other prior parameters have been supplemented. Specifically, the General Water Quality parameter requires a continuous datalogger, which will require two field visits for installation and deployment as opposed to the previous single observation taken during one visit, as is still done along with bioassessment.<sup>127</sup> The new method generates a continuous record of readings from over 5,000 individual time intervals for the Alameda County Claimants and over 2,500 individual time intervals for the San Mateo County Claimants, requiring additional staff time to download the data and calculate interpretive statistics as well as performance of additional maintenance and calibration for the required Multi-parameter

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<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 3.

<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> Id.

<sup>127</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 3; Exhibit E to 2011 Declaration of James Scanlin, ¶ 3.

probe before and after each deployment.<sup>128</sup> Lastly, Alameda County Claimants must now conduct Stream Surveys for nine stream miles, whereas the prior monitoring workplan commitment was a maximum survey of 3.5 stream miles in one year.<sup>129</sup>

In addition to field equipment and analytical laboratory testing costs which have substantially increased, as shown above, it is undisputed that Test Claimants must also supply additional staff in order to take the additional samples required by the MRP and manage the additional data.<sup>130</sup> This has resulted in additional funding needs in both the Alameda County Claimants' budget and the San Mateo County Claimants' budget. Accordingly, it is apparent that MRP Provision C.8.c does not merely add more specificity – it also substantively imposes a new program and requirements for higher levels of service.

### 3. C.8.d – Monitoring Projects

Provision C.8.d requires Test Claimants to conduct three categories of monitoring projects: stressor/source identification actions; BMP effectiveness investigation; and geomorphic projects. In referring to the stressor/source identification projects of MRP Provision C.8.d.i, the Regional Board incorrectly argues that these monitoring projects are required under the MRP as monitoring results indicate that a permittee's discharge exceeds a "trigger."<sup>131</sup> This is inaccurate. The monitoring triggers at issue do not necessarily pertain to the permittee's discharge, but rather to monitoring of receiving water conditions.<sup>132</sup> More accurately, both the status monitoring under C.8.c and the projects under C.8.d are designed to: 1) determine if water quality objectives in local receiving waters are being met; and 2) if not, to determine if MS4 discharges are having an impact. In short, pressed for resources to do its own job, the Regional Board is effectively offloading these tasks to the Test Claimants and using its discretion under the Clean Water Act and state law to so do.

It is not surprising, therefore, that the Regional Board fails to address the additional expenditures required by Test Claimants to comply with the new provisions. Moreover, relative to the specific evidence of the associated costs in the record, it is undisputed that the Test Claimants were required to expend these additional funds because the requirements of MRP Provision C.8.d were not required under the prior permits.<sup>133</sup> Accordingly, Test Claimants assert MRP Provision C.8.d is also a new program or higher levels of service.

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<sup>128</sup> See MRP Table 8.1 and associated footnotes; Exhibit E to 2011 Declaration of Jon Konnan, ¶ 3; Exhibit E to 2011 Declaration of James Scanlin, ¶ 120.

<sup>129</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 3.

<sup>130</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 3; *Id.*

<sup>131</sup> Regional Board Response, p. 34.

<sup>132</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>133</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.



a. C.8.d.i – Stressor/Source Identification

The Regional Board admits that MRP Provision C.8.d.i sets forth more detail about the requirements than were required under the prior permits but nevertheless asserts that this provision does not require a new program or higher level of service.<sup>134</sup> But the devil is in the details – a comparison of the prior permit provisions and MRP provision C.8.d.i shows that the MRP changes the default assumptions regarding the need for investigations. Under the previous permit's provision C.1, permittee action was required only when the Regional Board or the permittee discovered it was causing a violation. The MRP requires investigation for problems in receiving waters without regard to permittee causation. The result is that more investigation will be required – even where the outcome determines the problem in receiving waters was not caused by the MS4. Specifically, if certain triggers occur, the MRP now requires specific and expensive studies to be conducted that were neither required nor implemented under C.1 of the previous permit.<sup>135</sup>

The Regional Board asserts that MRP provision C.8.d.i is actually less stringent and costly than the prior permit because the number of investigations is capped during the permit term.<sup>136</sup> The existence of a cap alone, however, does not mean the new provisions are less costly. First, the investigation cap would only save costs if the programs previously spent more money on investigations than they will under the MRP, which just is not the case. For example, while the Alameda County Claimants do not need to conduct more than five investigation projects under the MRP, they conducted only three to four during the prior permit term. Similarly, although the San Mateo County Claimants do not need to conduct more than three investigation projects under the MRP, no such investigations occurred under the prior permit.<sup>137</sup> In addition, because MRP provision C.8.d.i(1) requires permittees to use elaborate EPA evaluation procedures, and the prior permit did not, the cost of each investigation project is increased.<sup>138</sup> Therefore, the Regional Board is incorrect that the MRP is less stringent and costly than the prior permit and it has put forward no evidence to support its sweeping generalizations.

b. C.8.d.ii – BMP Effectiveness Investigation

The Regional Board states that MRP Provision C.8.d.ii is consistent with the prior permits because the prior permits required Test Claimants to conduct monitoring designed in part to evaluate the effectiveness of representative storm water pollution prevention or control measures.<sup>139</sup> This very general requirement in the previous permits was met through the existing stormwater program and receiving water monitoring programs, which were

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<sup>134</sup> Regional Board Response, p. 34.

<sup>135</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 4.

<sup>136</sup> Regional Board Response, p. 34.

<sup>137</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 4.

<sup>138</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>139</sup> Regional Board Response, p. 35.

sufficient to help evaluate the overall effectiveness of the various types of BMPs implemented through municipal stormwater programs.<sup>140</sup> The MRP, on the other hand, requires a specific new study to “investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control.”<sup>141</sup> Thus, this new provision requires specific new BMP evaluation studies that were not required under the previous permit.<sup>142</sup> This increases costs under the MRP over the prior permits and is a new program or higher level of service.

c. C.8.d.iii – Geomorphic Project

The Regional Board claims that MRP Provision C.8.d.iii is not a new program or higher level of service.<sup>143</sup> Specifically, the Regional Board points to the amendment to the prior permits, which required Test Claimants to develop and implement hydromodification management plans and to monitor the effectiveness of hydromodification control measures.<sup>144</sup> While prior permits indeed required the implementation of hydromodification management plans, contrary to the Regional Board’s assertion, the Adopted Order R2-2007-0025 cited by the Regional Board contains no requirement to monitor effectiveness of hydromodification control measures.

Again, the prior permits did not require Test Claimants to do what is now required. MRP provision C.8.d.iii(3) requires Test Claimants to conduct a geomorphic study, which among other things, requires that Test Claimants survey channel dimensions and construct permanent protruding monuments. This is obviously new, and different from, the prior requirements to develop hydromodification management plan. While the Hydromodification Management Plan prepared by Alameda County Claimants during the prior permit cited some geomorphic studies performed by others, and noted that such studies could be an optional strategy for confirming the effectiveness of specific types of hydromodification management controls,<sup>145</sup> it did not state that such studies would be done or were required. In addition the permit amendments incorporating hydromodification management measures applied to Provision C.3 addressing new development and redevelopment projects, not monitoring.<sup>146</sup> Accordingly, as MRP Provision C.8.d.iii requires Test Claimants to institute programs not required by the prior permits and to expend more funds than required under the prior permits, it is a new program or higher level of service.

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<sup>140</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>141</sup> MRP Provision C.8.d.ii.

<sup>142</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 4; Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>143</sup> Regional Board Response, p. 35.

<sup>144</sup> *Id.*

<sup>145</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>146</sup> *Id.*

#### 4. C.8.e – Pollutants of Concern And Long-Term Trends Monitoring

Test Claimants contend MRP Provisions C.8.e.i, C.8.e.ii and C.8.e.vi constitute new programs or higher levels of service. The Regional Board, disagreeing with Test Claimants, addresses each of these provisions separately in its Response. Accordingly, Test Claimants will follow the same format.

Additionally, the Regional Board alleges that Test Claimants did not “expressly contend” certain provisions were new programs or higher levels of service.<sup>147</sup> Although Test Claimants did not explicitly note in the headings of their Narrative Statements that C.8.e.iii, C.8.e.iv, and C.8.e.v were new programs or higher levels of service, Test Claimants did address these provisions in relation to the C.8.e provisions noted in the headings.<sup>148</sup> Specifically, Test Claimants noted that these provisions defined the parameters and frequencies, protocols, and methods required for monitoring pollutants of concern.<sup>149</sup> In fact, Test Claimants included the language of these provisions in the initial test claim documents.<sup>150</sup> Most particularly, the new pollutants and analytes required by provision C.8.e.iii, and procedures required by provision C.8.e.iv and v, are referenced in both the Test Claimants’ Narrative Statements and their supporting declarations.<sup>151</sup> Indeed, the additional pollutants and analytes comprise a significant portion of the increased costs associated with this provision set forth in the test claims.<sup>152</sup> Accordingly, these provisions have been challenged to the extent C.8.e.i, C.8.e.ii and C.8.e.vi requires Test Claimants to comply with either C.8.e.iii, C.8.e.iv, or C.8.e.v in order to monitor for Pollutants of Concern or Long Term Monitoring.

##### (a) C.8.e.i – Pollutants of Concern Loads Monitoring Locations

MRP Provision C.8.e requires Test Claimants to monitor for pollutants of concern at locations specified in the MRP. The purpose of this provision is fourfold: 1) to identify which Bay tributaries, including stormwater conveyances, contribute most to Bay impairments from pollutants of concern; 2) to quantify annual loads or concentrations of pollutants of concern from tributaries to the Bay; 3) to quantify the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and 4) to quantify the projected impacts of management actions, including control measures on

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<sup>147</sup> Regional Board Response, p.35.

<sup>148</sup> City of Alameda Test Claim Narrative, pp. 16–17; City of Brisbane Test Claim Narrative, pp. 15-16.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> See City of Alameda Test Claim Narrative at pp. 16–17, and City of Brisbane Test Claim Narrative at pp. 15-16 [specifically referencing provision C.8.e.iii, iv, and v and quoting provision C.8.e.iii], 2010 Declaration of Jon Konnan at p. 4; 2010 Declaration of James Scanlin at pp. 3-4.

<sup>152</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

tributaries, and identify where these management actions should be implemented to have the greatest beneficial impact.

The Regional Board admits that these requirements add more specificity than Test Claimants previous permits.<sup>153</sup> Nevertheless, the Regional Board again brushes the specifics to the side and simply and erroneously asserts without any evidence that MRP Provision C.8.e.i does not increase the monitoring requirements of the previous permits.<sup>154</sup>

In support of its argument, the Regional Board quotes language in the prior monitoring program language. Specifically, the monitoring programs “characterize ‘representative drainage areas and stormwater discharges’... assess ‘existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges...’ and evaluate ‘effectiveness of representative stormwater pollution prevention or control measures.’”<sup>155</sup> The Regional Board contends this language is equivalent to the four above-noted requirements of MRP Provision C.8.e.i. This is incorrect.

The prior permit only required Test Claimants to implement a monitoring plan, which Test Claimants developed and the Regional Board approved.<sup>156</sup> Now, these prior approved monitoring plans will no longer suffice, requiring Test Claimants to greatly supplement the previous monitoring efforts.<sup>157</sup> For example, Alameda County Claimants will be required to add one additional monitoring station (Zone 4 Line A at Chabot Road in Hayward, MRP provision C.8.e.i(3)) in order to comply with the MRP.<sup>158</sup> This will require substantial funds both to construct and to maintain.<sup>159</sup> Similarly, San Mateo County Claimants will be required to add two new monitoring stations (MRP Provision C.8.e.i(7 and 8)) in order to comply with the MRP.<sup>160</sup> This will also require substantial funds to construct, operate and maintain.<sup>161</sup> The two new field sampling stations will need multiple autosamplers, accessory tubing, cables, batteries and sample bottles, security enclosures and solar panels, all of which require ongoing maintenance.<sup>162</sup> Analysis for many of the parameters is costly and provided by very few commercial laboratories.<sup>163</sup> For example, accurate methods for measures the pesticide fipronil have only been published in the last 5 to 10 years, and there is no commercial market incentive for laboratories to offer this service at low cost.<sup>164</sup> It is likely

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<sup>153</sup> Regional Board Response, p.36.

<sup>154</sup> Id.

<sup>155</sup> Id. [citing Test Claimants’ prior permits].

<sup>156</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> Id.

<sup>160</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 5.

<sup>161</sup> Id.

<sup>162</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 5; Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>163</sup> Id.

<sup>164</sup> Id.

that several different labs would be needed to provide SWAMP-comparable results as required by the MRP.<sup>165</sup> The deployment of the above equipment and the above lab work was neither required nor implemented under the previous permit.<sup>166</sup>

Additionally, Test Claimants have presented financial data addressing the additional expenditures that will be required to comply with MRP Provision C.8.e.i.<sup>167</sup> The Regional Board does not attempt to discredit Test Claimants' figures and has not presented any competing evidence.

Although the Regional Board is correct that Test Claimants have alternatives that can be used instead of implementing C.8.e.i,<sup>168</sup> use of these alternatives would not lower the higher level of service required by the MRP. In fact, MRP provision C.8.e, page 73, states that alternative approaches may only be pursued if the alternative requires "an equivalent level of monitoring effort." As such, the alternatives would be just as burdensome and costly and the approach specified in the MRP.

Accordingly, concrete evidence has been presented to the Commission showing the higher level of effort, and this evidence has not been refuted. Accordingly, it is effectively undisputed that MRP Provision C.8.e.i is a new program or represents requirements demanding higher levels of service.

**(b) C.8.e.ii – Long-Term Monitoring Locations**

MRP Provision C.8.e.ii requires Test Claimants to conduct long-term monitoring at stations listed in the MRP in order to assess long-term trends in pollutant concentrations and toxicity in receiving waters and sediment in order to identify whether stormwater discharges are causing or contributing to toxic impacts on aquatic life. Again, the Regional Board is offloading its own work and resource demands onto the local government budgets of the Test Claimants.

Test Claimants have noted this provision requires the implementation of a new program; the prior permits did not require long-term monitoring.<sup>169</sup> In response, the Regional Board argues that because Claimants were required to conduct some multiyear monitoring programs, "C.8 Claimants were already subject to long term monitoring requirements."<sup>170</sup> However, this statement misses the point. Test Claimants acknowledge that they were previously required to perform some multiyear monitoring, but that multiyear monitoring

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<sup>165</sup> Id.

<sup>166</sup> Id.

<sup>167</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>168</sup> Regional Board Response, p. 36.

<sup>169</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>170</sup> Regional Board Response, p. 37.

was not equivalent to the monitoring required by MRP Provision C.8.e.ii.<sup>171</sup> Furthermore, Test Claimants will have to implement a new program in order to comply with this provision of the MRP.<sup>172</sup>

Specifically, Alameda County Claimants will be required to add 2 new monitoring stations in order to comply with the increased parameters required by C.8.e.ii, and San Mateo County Claimants will also be required to add 2 new monitoring stations.<sup>173</sup> The prior Alameda County monitoring program used one “ISCO”-type autosampler at a station initially installed in 1988.<sup>174</sup> Sampling the required Category 1 and Category 2 parameters in MRP Table 8.4 would require a minimum of four autosamplers per station with a purchase cost of \$3,200.<sup>175</sup> Accessory tubing, cables, batteries and sample bottles increase the effective unit cost to over \$5,000 per sampler.<sup>176</sup> Stations with multiple samplers also require larger security enclosures and solar panels, with higher ongoing maintenance costs.<sup>177</sup> Furthermore, estimated laboratory cost for the MRP Category 1 parameter list are \$13,000 per site for the required minimum four sampling events per year.<sup>178</sup> In alternate years Category 2 parameters would be an additional \$4,000.<sup>179</sup> Analysis for many Category 2 parameters is costly and provided by very few commercial laboratories.<sup>180</sup> In contrast to previous Alameda County Claimant samples which could be shipped to a single laboratory, it is likely that several different labs would be needed to provide SWAMP comparable results as required by the MRP.<sup>181</sup>

Test Claimants have submitted uncontested financial figures to demonstrate this difference from the prior permits.<sup>182</sup> For example, the new long-term monitoring requirements will require the Alameda County Claimants to spend an additional \$4,865 over the two years after the MRP’s implementation,<sup>183</sup> and the San Mateo County Claimants will similarly be required to expend an additional \$5,000 over that same period.<sup>184</sup> The Regional Board fails to address these additional expenditures, and instead only points to generic language of the previous permits. The Regional Board has done nothing to undermine the plain facts established by the evidence submitted with the test claims – that the long term monitoring required by the MRP is much more costly than the prior program.

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<sup>171</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 5; Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>175</sup> Id.

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id.

<sup>179</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>180</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 5; Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>181</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

<sup>182</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>183</sup> Exhibit A to 2010 Declaration of James Scanlin.

<sup>184</sup> Exhibit A to 2010 Declaration of Jon Konnan.

Accordingly, as Test Claimants must institute a new program, and expend additional funds in order to comply with MRP Provision C.8.e.ii, MRP Provision c.8.e.ii requires a new program or higher level of service.

(c) C.8.e.vi – Sediment Delivery Estimate/Budget

MRP Provision C.8.e.vi requires Test Claimants to develop a design for a sediment delivery estimate and sediment budget for local tributaries and urban drainages.

The Regional Board admits that “prior permits did not require [Test Claimants] to design or implement sediment delivery studies.”<sup>185</sup> Nevertheless, the Regional Board somehow argues the additional requirements added by MRP Provision C.8.e.vi only add specificity to the previously required monitoring requirements, and therefore do not impose a higher level of service.<sup>186</sup> Once again, the Regional Board fails to address Test Claimants’ argument that MRP Provision C.8.e.vi imposes on them a new requirement having a substantial financial burden.

Moreover, the Regional Board fails to cite to any provision of any of the Test Claimants’ prior permits in order to substantiate its conclusory assertion that C.8.e.vi is not a new program or higher level of service. The Regional Board also fails to explain how C.8.e.vi is required in order to comply with the published requirements of the Clean Water Act. Rather, this is yet another example of the Regional Board using its discretion to offload its desired work and associated resource needs to local governments.

Test Claimants have put forth evidence which shows an increase in expenditures will be required in order to comply with the new MRP provision C.8 requirements.<sup>187</sup> The Regional Board does not rebut these figures. Furthermore, the Regional Board fails to explain the alleged similarities between the prior permits and the MRP, instead relying solely on its conclusory and self-serving statement that the MRP is only more specific.<sup>188</sup> Test Claimants have proven the Regional Board’s argument to be untrue, both by using the cost information as evidence<sup>189</sup> and by demonstrating the prior permits did not require the new sediment delivery estimate/budget.<sup>190</sup> Accordingly, Test Claimants submit it is effectively conceded and established that MRP Provision C.8.e.vi is a new program or higher level of service.

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<sup>185</sup> Regional Board Response, pp. 37-38.

<sup>186</sup> *Id.*, at p. 38.

<sup>187</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>188</sup> Regional Board Response, pp. 37-38.

<sup>189</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>190</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 5; Exhibit E to 2011 Declaration of James Scanlin, ¶ 5.

## 5. C.8.f. – Citizen Monitoring And Participation

MRP Provision C.8.f requires Test Claimants to encourage citizen monitoring and make reasonable efforts to seek out citizen and stakeholder information and comment as well as requiring Test Claimants to demonstrate annually in their annual Urban Creeks Monitoring Reports that they have encouraged citizen and stakeholder observations and reporting of waterbody conditions.

Test Claimants contend this provision implements a new program and higher level of service. The prior permits did not require the same type and scope of activities to encourage citizen monitoring.<sup>191</sup> Specifically, the prior permits and plans did not require Test Claimants to seek out citizen and stakeholder information and to solicit comments regarding water body function and quality.<sup>192</sup> The MRP provisions require Test Claimants to increase their level of coordination as well as expend more staff hours in order to accomplish the required citizen encouragement and coordination.<sup>193</sup> To support this position, Test Claimants have submitted evidence demonstrating the increased expenditures that will be needed in order to meet the requirements of C.8.f.<sup>194</sup>

## 6. C.8.g – Reporting

Provision C.8.g imposes various requirements for reporting of monitoring results. Specifically, Test Claimants must take actions in the event monitoring data indicates stormwater runoff or dry weather discharges may be causing or contributing to an exceedance of applicable water quality standards.<sup>195</sup> Furthermore, Test Claimants are required to submit the following annual reports: Electronic Status Monitoring Data Report; Urban Creek Monitoring Report; and Integrated Monitoring Report.<sup>196</sup>

The Regional Board admits that Test Claimants' prior permits did not require them to submit the new reports required by MRP Provision C.8.g.<sup>197</sup> Nevertheless, the Regional Board argues that these reporting requirements are either de minimus or merely add more specificity to the previous reporting requirements.<sup>198</sup>

Test Claimants disagree. Prior reporting obligations were less costly.<sup>199</sup> By significantly increasing the number of data parameters and programs required under C.8.c, C.8.d, and

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<sup>191</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 6; Exhibit E to 2011 Declaration of James Scanlin, ¶ 6.

<sup>192</sup> Id.

<sup>193</sup> Id.

<sup>194</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>195</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 7.

<sup>196</sup> Id.

<sup>197</sup> Regional Board Response, p. 40.

<sup>198</sup> Id.

<sup>199</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin; Exhibit E to 2011 Declaration of James Scanlin, ¶ 7.



C.8.e, the total level of reporting effort must be increased to comply with the MRP.<sup>200</sup> Test Claimants have put forth evidence which the Regional Board has not refuted proving the MRP C.8 provisions are more costly than under prior permits.<sup>201</sup> Accordingly, MRP Provision C.8.f is a new program or reflects requirements calling for a higher level of service.

## 7. C.8.h – Monitoring Protocols And Data Quality

MRP provision C.8.h requires that monitoring data must be SWAMP<sup>202</sup> comparable. In order to comply with SWAMP, minimum data quality and reporting format must be consistent with the latest version of the SWAMP Quality Assurance Project Plan for applicable parameters, including data quality objectives, field and laboratory banks, field duplicates, laboratory spikes, and clean techniques, using the most recent standard operating procedures.<sup>203</sup> This type of monitoring protocol was not required by Test Claimants' prior permits.<sup>204</sup>

The Regional Board admits that prior permits did not require the monitoring protocol to be SWAMP comparable.<sup>205</sup> However, the Regional Board states that Alameda County was still subject to equivalent requirements.<sup>206</sup> Specifically, the Regional Board states the required quality assurance procedures for monitoring were equivalent to the SWAMP quality assurance project plan, and therefore a reimbursable state mandate is allegedly not imposed.<sup>207</sup>

Once again, the Regional Board fails to address the additional requirements and expenditures the MRP imposes on Test Claimants, and asserts its general argument that provisions relating to the same general subject matter must be equivalent. The Regional Board's observation that prior permits required quality assurance procedures does not alter the fact that the MRP imposes much greater and more burdensome and expensive quality assurance procedures.<sup>208</sup>

Test Claimants have put forward uncontested evidence showing that cost increases will occur in order to comply with the MRP Provision C.8.h.<sup>209</sup> These increases support the

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<sup>200</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 7.

<sup>201</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>202</sup> SWAMP is the States Water Board's Surface Water and Ambient Monitoring Program.

<sup>203</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 7; Exhibit E to 2011 Declaration of James Scanlin, ¶ 8.

<sup>204</sup> *Id.*

<sup>205</sup> Regional Board Response, p. 41.

<sup>206</sup> *Id.* The Regional Board fails to make similar arguments against Brisbane or San Mateo County, or even address their prior permit. Accordingly, the Regional Board has conceded MRP provision C.8.h imposes a new program or higher levels of service on the San Mateo County Claimants.

<sup>207</sup> Regional Board Response, p.41.

<sup>208</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 7; Exhibit E to 2011 Declaration of James Scanlin, ¶ 8.

<sup>209</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

assertion that quality assurance requirements under the previous permits were not equivalent to those under the MRP Provision C.8.h.<sup>210</sup> Provision C.8.h of the MRP requires Test Claimants to significantly update or add to existing field standard operating procedures and they must also train field staff to allow for SWAMP comparable monitoring data to be properly collected.<sup>211</sup> Additionally, new data management systems must be developed and managed, which result in significant cost increases.<sup>212</sup> Monitoring data quality assurance procedures will also have to be developed, documented and adhered to by the Test Claimants, which will require an increased level of effort, such as providing additional staff hours.<sup>213</sup>

As noted above, Test Claimants must develop new programs to comply with MRP Provision C.8.h. These new programs will require Test Claimants to incur additional costs, as documented in the original test claim filings.<sup>214</sup> These figures have not been challenged. Accordingly, the undisputed evidence shows MRP Provision C.8.h requires a new program or higher levels of service.

### **B. Provision C.8 Is Not Required by Federal Law**

The parties to this proceeding agree that the central issue before the Commission is whether the challenged provisions of the MRP exceed federal requirements for MS4 permits or are the product of the Regional Board's exercise of discretion.<sup>215</sup> The Regional Board asserts the challenged C.8 provisions are required by the Clean Water Act and are not reimbursable state mandates.<sup>216</sup> Test Claimants disagree.

The Regional Board's arguments in this section are somewhat repetitive of the issues addressed in Sections II and III, and those issues will not be discussed again here to the extent possible. In general, the Regional Board argues the Clean Water Act section 402(p)(3)(B) provides "broad legal authority for the requirements in Provision C.8."<sup>217</sup> According to the Regional Board, the C.8 monitoring provisions are required by the section 402(p)(3)(B) statements that MS4 permits must effectively prohibit non-stormwater discharges, require controls to reduce the discharge of pollutants to the MEP, and such other provisions as the State determines appropriate for the control of such pollutants.<sup>218</sup>

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<sup>210</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 8.

<sup>211</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 7; Exhibit E to 2011 Declaration of James Scanlin, ¶ 8.

<sup>212</sup> Id.

<sup>213</sup> Id.

<sup>214</sup> Exhibit A to 2010 Declaration of Jon Konnan; Exhibit A to 2010 Declaration of James Scanlin.

<sup>215</sup> Regional Board Response, p. 42.

<sup>216</sup> Id.

<sup>217</sup> Id.

<sup>218</sup> Id. The Regional Board persists in its argument that this last provision of section 402(p)(3)(B) requires the imposition of controls beyond MEP. This is incorrect, as explained above.

It is important to note that the Regional Board's arguments in this section arise in the context of a discussion regarding the MRP's detailed and prescriptive monitoring provisions.<sup>219</sup> Test Claimants do not quarrel with the fact that NPDES permits, as a general matter, must include monitoring requirements, and that those requirements should enable the Regional Board to determine whether the permittee is in compliance with the permit's substantive provisions. The Clean Water Act does not require, however, the specific types of monitoring at issue here or monitoring for purposes other than determining compliance with substantive permit provisions.

While the Regional Board generically claims the C.8 monitoring provisions are necessary to ensure compliance with the section 402(p)(3)(B) requirements to effectively prohibit non-stormwater discharges and to ensure the permit includes controls to reduce the discharge of pollutants to the MEP,<sup>220</sup> it does not offer any explanation as to why the particular C.8 provisions at issue in these test claims are needed for that purpose. For example, the Regional Board contends the C.8 provisions at issue here are necessary to insure non-stormwater discharges are effectively prohibited.<sup>221</sup> The MRP includes an entire provision on Illicit Discharge Detection and Elimination (C.5) and a provision on Exempted and Conditionally Exempted Dischargers (C.15), which have not been challenged in this proceeding, and which bear basically no relationship to the C.8 provisions at issue. In addition, the Regional Board can determine compliance with the Illicit Discharge Detection and Elimination permit provisions by virtue of the numerous reporting requirements contained in that permit section.<sup>222</sup> Moreover, the Regional Board has not offered any explanation as to why the monitoring provisions in the prior permits were insufficient to determine that the permit includes controls to reduce the discharge of pollutants to the MEP, and why the new provisions are needed to achieve that end. While the Regional Board has certain power under state law to potentially order dischargers to investigate receiving waters somewhat remote from the dischargers' outfalls,<sup>223</sup> there is no necessity under the Clean Water Act to do so because such monitoring is not necessary to determine compliance with the substantive permit provisions.

The Regional Board claims that "[u]nder Clean Water Act section 303, a stormwater permit must include provisions in MS4 permits that are required to implement the wasteload allocations of TMDLs."<sup>224</sup> As indicated above, Section 303 does not contain any such provision and EPA's prior regulation requiring implementation plans for TMDLs has long ago been withdrawn in recognition that implementation is a state law-driven matter exclusively.

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<sup>219</sup> Regional Board Response, p. 42.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See, e.g., MRP C.5.c.iii, C.5.d.iii, C.5.e.iii, and C.5.f.iii.

<sup>223</sup> See Water Code § 13267.

<sup>224</sup> Regional Board Response, p. 42.

Finally, and significantly, the Regional Board ignores the fact that by exercising its true discretion in deciding how to implement general Clean Water Act provisions, the Regional Board freely chose to impose state mandates.<sup>225</sup>

**(a)** Collaborative And Watershed Monitoring

The Regional Board argues that the MRP's collaborative and watershed monitoring requirements are mandated by federal law.<sup>226</sup> This contention fails for two reasons. First, it fails to address the main point the Test Claimants made in the Narrative Statement: "collaborative watershed-level activities as required under the MRP may be authorized, but are not required by federal law."<sup>227</sup> The Regional Board's argument heading states such monitoring is "required by federal law," but it offers no citation or explanation that demonstrates that is the case.<sup>228</sup> Second, the Regional Board's contention that the MRP does not actually require collaborative monitoring is unavailing because all alternatives under C.8 require any permittee that opts out of collaborative monitoring to undertake the same level of effort. Because C.8 imposes new programs and a higher level of service, the fact that an equally burdensome alternative exists is not persuasive for these proceedings.

**(b)** Characterization of MS4 Discharges

The Regional Board's contention that MRP provisions requiring monitoring of local receiving waters has already been fully addressed above. These increased burdens imposed by these provisions over the monitoring program under the prior permits is effectively uncontested and not necessary to comply with the Clean Water Act, and the Regional Board has offered no evidence or explanation to the contrary.

**(c)** Citizen Monitoring

The Regional Board argues that the Clean Water Act mandated MRP provisions regarding citizen monitoring.<sup>229</sup> The Regional Board's citation to authority does not support its position. First, the Regional Board cites Clean Water Act section 101(e),<sup>230</sup> which simply provides that rulemaking and enforcement under the act (activities undertaken by EPA or delegated state agencies like the Regional Board, not local government permittees) should allow for public comment. It also says nothing about the type of citizen monitoring at issue in the C.8 provisions. Second, the Regional Board cites Code of Federal Regulations, title 40, part 122.26(d)(2)(iv), which just requires management plans to allow for public

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<sup>225</sup> Hayes, supra, 11 Cal.App.4th at 1593-94.

<sup>226</sup> Regional Board Response, p. 43.

<sup>227</sup> City of Alameda Test Claim Narrative, p. 27, underlining included; City of Brisbane Test Claim Narrative, p. 21, underlining included.

<sup>228</sup> Regional Board Response, p. 43.

<sup>229</sup> Id., at p. 46.

<sup>230</sup> 33 U.S.C. § 1251(e).

participation in “a comprehensive planning process” – again, just a requirement to allow for public comment, unrelated to soliciting citizen monitoring efforts. Third, the Regional Board cites Code of Federal Regulations, title 40, part 122.26(d)(2)(iv)(b)(5), a component of the illicit discharge detection and elimination program. This regulation does not relate to the type of citizen monitoring at issue in the C.8 provisions, and is implemented by provision C.5.c<sup>231</sup> under the Illicit Discharge provisions.

#### (d) Electronic Reporting

The Regional Board’s argument that electronic reporting is required by federal law is also unpersuasive and unsupported by authority. The Regional Board states that purpose of the only regulations it cites, Code of Federal Regulations, title 40, part 122.41(j) and 122.48, “is to ensure monitoring data are of adequate quality for their intended use.”<sup>232</sup> Electronic reporting, however, has nothing to do with the quality of the data; it just describes a new program for reporting data, the transition cost of which is not insignificant, given associated hardware, software and personnel needs to support it. The Regional Board’s authority is therefore inapposite. Certainly there is nothing the Regional Board can point to in the Clean Water Act or EPA’s regulations that actually requires electronic reporting.

### 2. **Electronic Reporting Is Not Required for Private Stormwater Dischargers**

In one last attempt to respond to the Test Claimants’ argument that Provision C.8 is a reimbursable mandate, the Regional Board notes that electronic reporting is in fact required for private stormwater dischargers.<sup>233</sup> Once again, the Regional Board misses the entire argument of the Test Claimants.

The MRP in particular, and the MS4 program in general, do not apply to private entities. The Regional Board appears to be alluding to its earlier argument based on a misinterpretation of the City of Richmond case, which stood for the proposition that state mandates cannot exist when a government entity is acting in the capacity as a private entity.<sup>234</sup> However, as previously explained, this is not the case in the test claims at hand. The MRP applies solely to public agencies in order to implement a public program, and the very definition of an MS4 is unique to governments.<sup>235</sup> Moreover, the MRP requires reporting on regional and receiving water monitoring that simply cannot be compared to the reporting of facility inspections and outfall monitoring required for industrial and construction facilities.

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<sup>231</sup> MRP Provision C.5.c.i states “[p]ermittees shall have a central contact point, including a phone number for complaints and spill reporting, and publicize this number to both internal Permittee staff and the public.”

<sup>232</sup> Regional Board Response, p. 47.

<sup>233</sup> Id.

<sup>234</sup> City of Richmond, *supra*, 64 Cal.App.4th at 1199.

<sup>235</sup> 40 C.F.R. § 122.26(b)(8).

### **C. Provision C.10 Is a New Program That Requires a Higher Level of Service**

The Regional Board admits that Provision C.10, which sets deadlines for phased reductions in trash loads from municipal separate storm sewer systems, requires a higher level of service than the previous MS4 permit.<sup>236</sup> However, the Regional Board then contradicts itself and states that Provision C.10 is not a new program, and suggests without any supporting authority that Provision C.10 is for some reason not subject to reimbursement.<sup>237</sup> The Regional Board's argument is confused and without merit.

The MRP's Provision C.10 is by far the most expensive provision at issue in these test claims. The financial impact is staggering. Test Claimants have submitted evidence that the C.10 provisions will require them to incur \$14,396,200 for FY 2010-2012 for the Alameda County Claimants and \$14,442,919 for FY 2010-2012 for the San Mateo County Claimants.<sup>238</sup> The Regional Board has not responded to or refuted this cost estimate evidence. In and of itself, this undisputed evidence demonstrates that the MRP's trash control provisions clearly impose new programs and higher levels of service.

The Commission has already decided in its Los Angeles and San Diego decisions that MS4 permits are directed solely to public agencies, and therefore are "programs" within the meaning of section 6 of Article XIII B of the California Constitution.<sup>239</sup> This conclusion, along with the Regional Board's concession that Provision C.10 requires a higher level of service, establishes that Provision C.10 is a reimbursable state mandate.

#### **1. C.10.a.i – Short-Term Trash Loading Reduction Plan**

The Regional Board admits that MRP Provision C.10.a.i "includes more specificity than was required in the prior permits."<sup>240</sup> However, the Regional Board dismisses this increase in specificity by stating Test Claimants were already required to provide for some removal of trash from the urban landscape of a stormdrain system.<sup>241</sup> However, the Regional Board is now requiring Test Claimants to implement a Short-Term Trash Reduction Plan to reduce 40% of trash from the storm drainage system.<sup>242</sup> This program requirement poses a significantly higher level of service than previously required, since the previous program is

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<sup>236</sup> Regional Board Response, p. 48.

<sup>237</sup> *Id.*

<sup>238</sup> Exhibit B to 2010 Declaration of Jon Konnan; Exhibit B to 2010 Declaration of James Scanlin.

<sup>239</sup> [Los Angeles Test Claim Decision], p. 48-49; [San Diego Test Claim Decision], p. 35-37.

<sup>240</sup> Regional Board Response, p. 49.

<sup>241</sup> *Id.*

<sup>242</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 10.

no longer sufficient, and, under the MRP, only new and increased levels of control measure implementation can be used to demonstrate the 40% reduction.<sup>243</sup>

As the Regional Board notes, the previous permits required Test Claimants to implement street sweeping and storm drain maintenance, and they had plans generally related to trash control.<sup>244</sup> However, these previous efforts established only a baseline and are significantly different from what is now required under the MRP.<sup>245</sup> The Regional Board now requires Test Claimants to reduce trash discharges from this baseline by 40%.<sup>246</sup> To comply with this baseline reduction, the Test Claimants will be forced to develop new programs and expend substantially more funds than previously required.<sup>247</sup>

For example, in order to comply with MRP Provision C.10.a.i, the San Mateo County Claimants now need to hire police officers to enforce illegal dumping activities, as well as consider hiring additional staff in order to establish ordinances that prohibit the distribution of single-use plastic grocery bags and polystyrene tableware, enact new street sweeping programs to increase sweeping frequencies in trash-prone areas, and create programs to enhance public education and outreach designed to reduce littering.<sup>248</sup> Accordingly, it is self-evident that the new 40% required reduction constitutes a new program and higher level of service.

## 2. C.10.a.ii – Baseline Trash Load And Trash Reduction Tracking Method

MRP Provision C.10.a.ii requires Test Claimants to document the amount of trash being discharged, develop a mechanism to track trash load reductions, and report to the Regional Board on its progress. This requirement is not comparable with the previous permit<sup>249</sup> or the Clean Water Act, and therefore is a reimbursable state mandate.

The prior permit only required the Alameda County Claimants to document the amount of litter that was actually removed, whereas the new permit now requires the Alameda County Claimants to document the amount of litter being discharged, a very different and more comprehensive requirement.<sup>250</sup> These two measures are not comparable. Reporting the amount of litter being discharged will require the Alameda County Claimants to develop and design an entirely new program to address these unknown figures, whereas the previous

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<sup>243</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 8; Exhibit E to 2011 Declaration of James Scanlin, ¶ 10.

<sup>244</sup> Regional Board Response, p. 49.

<sup>245</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 10.

<sup>246</sup> *Id.*

<sup>247</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 8; Exhibit E to 2011 Declaration of James Scanlin, ¶ 10.

<sup>248</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 8.

<sup>249</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 13.

<sup>250</sup> *Id.*

reporting requirement concerned figures more easily discernable to the Alameda County Claimants, specifically, the amount of trash actually removed from the stormwater system.<sup>251</sup>

Similarly, neither the City of Brisbane's previous permit nor plans developed by the member agencies of the San Mateo Countywide Water Pollution Prevention Program included provisions or tasks to develop baseline trash loading estimates or load reduction tracking methodologies.<sup>252</sup> Furthermore, although the previous permits required submittals of street sweeping data, these same submittals no longer meet the new requirements imposed by provision C.10.a.ii as a "baseline trash load" or a "trash reduction tracking method."<sup>253</sup>

Accordingly, MRP Provision C.10.a.ii requires a new program and higher level of service to be implemented than was required by the previous permit.

### 3. C.10.a.iii – Minimum Full Trash Capture

MRP Provision C.10.a.iii requires Test Claimants to purchase, install and maintain a mandatory minimum number of trash full capture devices. The C.10 provisions in general are the most costly in these test claims, and the Minimum Full Trash Capture provisions are the most expensive of all the C.10 provisions. Again, the estimates for the state mandated investment required here are massive: \$6,243,971 for the Alameda County Claimants in 2010 and \$6,247,321 in 2011; \$3,356,027 for the San Mateo County Claimants in 2010 and \$3,356,027 in 2011.<sup>254</sup> In total, the estimated two years' costs for Test Claimants attributable to MRP Provision C.10.a.iii alone amount to \$19,203,346.<sup>255</sup>

While these cost estimates make it clear that the MRP requires a huge investment in Minimum Full Trash Capture devices, the prior permits did not require any of these devices to be installed.<sup>256</sup> By way of example, to comply with the new Minimum Full Trash Capture provisions, the City of San Leandro has installed devices in 250 drop inlets.<sup>257</sup> The level of effort required to operate and maintain these devices is much greater and more burdensome than previously required.<sup>258</sup>

Although the Regional Board asserts that Santa Clara County had cooperated in a pilot program regarding trash full capture devices,<sup>259</sup> the Regional Board fails to cite to any

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<sup>251</sup> Id.

<sup>252</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 9.

<sup>253</sup> Id.

<sup>254</sup> Exhibit B to 2010 Declaration of Jon Konnan; Exhibit B to 2010 Declaration of James Scanlin.

<sup>255</sup> Id.

<sup>256</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 10.

<sup>257</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 15.

<sup>258</sup> Id.

<sup>259</sup> Regional Board Response, p. 51.



previous permit provision that required either the San Mateo County Claimants or the Alameda County Claimants to institute this type of program.

The fact that one test claimant instituted a partial pilot program does not mean that all of the permittees were required to perform the MRP program. A partial pilot program is significantly different from the requirements under the MRP.<sup>260</sup> Nevertheless, this is the argument the Regional Board is making. The Regional Board cannot credibly argue that this provision does not institute a new program or higher level of service.

#### 4. C.10.b.i and C.10.b.ii – Hot Spot Cleanup, Definition, And Selection

Under MRP Provisions C.10.b.i and C.10.b.ii, the Test Claimants are required to identify and submit information and photo documentation of trash hot spot assessments and cleanups to the Water Board, which prior permits did not require. Nevertheless, the Regional Board contends these additional provisions are merely extensions of the prior permits and do not constitute a new program or higher level of service.<sup>261</sup>

The Alameda County Claimants note that the prior permit required them only to conduct a few pilot trash assessments at various stream locations.<sup>262</sup> However, they were not required to perform cleanups as part of the pilot programs.<sup>263</sup> MRP Provisions C.10.b.i and C.10.b.ii now require the Alameda County Claimants to perform assessments and cleanups. In order to comply, these claimants must develop a new program and expend substantial funds to do so.<sup>264</sup>

Furthermore, the number of trash assessments required by the new MRP provisions is substantially greater than the previous assessment requirements.<sup>265</sup> Previously, the Alameda County Claimants conducted 3 pilot trash assessments.<sup>266</sup> Under MRP Provisions C.10.b.i and C.10.b.ii, they must now conduct 55 assessments and cleanups.<sup>267</sup> Stating this new requirement does not impose a new program or higher levels of service strains credibility.

The Regional Board also argues the San Mateo County Claimants participated in required creek cleanups as part of its prior permit.<sup>268</sup> However, the San Mateo County Claimants were not actually required to perform creek cleanups, but rather did so voluntarily as part of

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<sup>260</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 15.

<sup>261</sup> Regional Board Response, pp. 51-52.

<sup>262</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 16.

<sup>263</sup> Id.

<sup>264</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 17.

<sup>265</sup> Id.

<sup>266</sup> Id.

<sup>267</sup> Id.

<sup>268</sup> Regional Board Response, pp. 51-52.

a pilot study to evaluate trash assessment methodologies.<sup>269</sup> Furthermore, the pilot study never required the San Mateo County Claimants to submit information and photo documentation as part of the creek cleanup as is now required.<sup>270</sup> In order to comply with the identification and reporting of hot spots required by MRP Provisions C.10.b.i and C.10.b.ii, the San Mateo County Claimants were required to expend considerable staff time and associated resources.<sup>271</sup> For example, hot spot selection guidance was developed to assist the County and other municipalities in selecting their hot spots and numerous work group meetings with municipal staff were conducted to coordinate this work.<sup>272</sup>

As Test Claimants are required to implement these tasks that were not previously required, and because Test Claimants must expend additional funds in order to comply, MRP Provisions C.10.b.i and C.10.b.ii constitute new programs and a higher level of service and are therefore reimbursable state mandates.

### 5. C.10.b.iii – Hot Spot Assessments

Similar to the other C.10.b provisions, the Regional Board asserts MRP Provision C.10.b.iii is not a new program despite its acknowledgment that this provision establishes more specific requirements than the previous permit.<sup>273</sup> For example, the MRP now requires Test Claimants to assess trash hot spots located throughout Alameda and San Mateo Counties and clean-up these hot spots to a level of “no visual impact.”

The Test Claimants submit this requirement is substantially greater than the previous requirements under the prior permits.<sup>274</sup> Specifically, the Alameda County claimants were previously required to only perform 3 site assessments annually, where now they must perform assessments and cleanups at 55 sites within the same period.<sup>275</sup> Furthermore, the costs associated with prior assessments are small as compared with the costs associated with clean-ups.<sup>276</sup> Accordingly, the MRP Provision C.10.b.iii has exponentially increased the level of service required from the Alameda County claimants.

Similarly, the San Mateo County claimants have never been required to conduct trash hot spot clean-ups under prior permits.<sup>277</sup> Nevertheless, the Regional Board argues that the clean-up and assessment of stream locations is equivalent to the creek cleanups under the prior permits. However, the Regional Board fails to note that under the prior permits, the

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<sup>269</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 11.

<sup>270</sup> Id.

<sup>271</sup> Id.

<sup>272</sup> Id.

<sup>273</sup> Regional Board Response, p. 52.

<sup>274</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 12; Exhibit E to 2011 Declaration of James Scanlin, ¶ 19.

<sup>275</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 19.

<sup>276</sup> Exhibit B to 2010 Declaration of James Scanlin.

<sup>277</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 12.

San Mateo County Claimants participated in the creek cleanups voluntarily through a pilot study in order to evaluate trash assessment methodologies, and was never under any specific requirement to do so.<sup>278</sup> In fact, the pilot study was primarily designed to identify types of trash found in creeks and sources, not to actually clean the trash in creeks.<sup>279</sup>

Accordingly, as Test Claimants are required to perform tasks not previously required, and because performing these tasks will result in significantly increased expenditures, Test Claimants submit MRP Provisions C.10.b.iii is a new program or higher levels of service, and thus is entitled to reimbursement.

## 6. C.10.c – Long-Term Trash Load Reduction

MRP Provision C.10.c requires Test Claimants to develop a long-term plan for trash reduction and submit this plan to the Regional Board. The Regional Board admits that such a long-term trash reduction plan has never been required.<sup>280</sup> Nevertheless, it somehow asserts that such a program does not impose a new program or higher level of service because the Test Claimants allegedly were previously required to develop short-term trash reduction plans.<sup>281</sup>

The Regional Board cites no evidence to show that Test Claimants were ever required to conduct planning efforts for short-term trash reduction or long-term trash reduction. In fact, Test Claimants were never previously required to implement either such plan.<sup>282</sup> Instead, Test Claimants were only required to plan trash assessment and source characterization activities, and not new or enhanced control measures.<sup>283</sup>

Accordingly, in order to comply with MRP Provision C.10.c, the Alameda County Claimants must implement a new program at a cost of \$152,057 for FY 2010-2012.<sup>284</sup> Similarly, the San Mateo County Claimants must also expend an additional \$133,352 for FY 2010-2012 in order to implement the new MRP Provision C.10.c requirements.<sup>285</sup>

These additional expenditures, along with the fact that previous permits did not require such a program to be implemented, are evidence that MRP Provision C.10.c is a new program or requires higher levels of service, and therefore are subject to reimbursement by the State.

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Regional Board Response, p. 53.

<sup>281</sup> *Id.*

<sup>282</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 13; Exhibit E to 2011 Declaration of James Scanlin, ¶ 20.

<sup>283</sup> *Id.*

<sup>284</sup> Exhibit B to 2010 Declaration of James Scanlin.

<sup>285</sup> Exhibit B to 2010 Declaration of Jon Konnan.

## 7. C.10.d – Reporting

MRP Provision C.10.d requires Test Claimants to provide a summary of: 1) trash load reduction actions; 2) the total trash loads and dominant types of trash removed by each of the actions; and 3) the percent annual trash load reduction relative to the baseline load. The prior permits did not require reporting requirements associated with trash reduction.<sup>286</sup> Accordingly, Test Claimants contend this MRP Provision C.10.d institutes a new program or higher level of service subject to reimbursement.

The Regional Board admits that MRP Provision C.10.d is more specific than the previous permit because the previous permit did not require these trash reports.<sup>287</sup> However, the Regional Board notes that Test Claimants were previously required to “report[] on their municipal maintenance activities and stream assessment and cleanup activities in their annual reports and other reports.”<sup>288</sup> As a result, the Regional Board argues this prior permit language required the same programs and service levels as MRP Provision C.10.d.<sup>289</sup> In reality, reporting for maintenance activities was substantively different from the newly specified requirements.<sup>290</sup> The type of reporting required by the MRP regarding characterization and quantification of a baseline trash load was never before reported to, let alone required by, the Regional Board.<sup>291</sup> Instead, the reporting requirements in MRP Provision C.10.d go well beyond the reporting requirements in the prior permits, none of which were associated with trash reduction.<sup>292</sup>

To comply with this provision of the MRP, the Alameda County Claimants will have to expend an additional \$57,084 annually while the San Mateo County Claimants will have to expend an additional \$35,782 annually.<sup>293</sup> These noted expenditures, along with the implementation of a program that never before existed, evidences that MRP Provision C.10.d implements a new program or higher levels of service.

### D. Provision C.10 Is Not Required by Federal Law

The Regional Board states Provision C.10 is required by federal law and thus is not subject to reimbursement by the State.<sup>294</sup> In support of this argument, the Regional Board states that the trash load reduction measure at issue was originally adopted by the Water Board in

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<sup>286</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 14.

<sup>287</sup> Regional Board Response, p. 53.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 14.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Exhibit B to 2010 Declaration of Jon Konnan; Exhibit B to 2010 Declaration of James Scanlin.

<sup>294</sup> Regional Board Response, p. 55.

1975, and thus is beyond the 12 month period for Test Claimants to challenge.<sup>295</sup> However, the 1975 date cited by the Regional Board undermines its position that the mandate flows from the Clean Water Act's stormwater permitting provisions, which were not even enacted until 1987, and its later references otherwise do not support this contention. Specifically, the Regional Board states that Provision C.10 comes from the San Francisco Bay Basin Plan, Chapter 4 – Implementation, Table 4-1 Prohibitions, Prohibition 7, which is consistent with the State Water Board's Enclosed Bays and Estuaries Policy, Resolution 95-84,<sup>296</sup> which prohibits the discharge of rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would eventually be transported to surface water.<sup>297</sup> This plan was implemented to primarily protect recreational uses such as boating and does not specifically require Test Claimants to implement the type of trash reduction measures required by MRP Provision C.10.<sup>298</sup>

Moreover, no prior permit required compliance with the type of requirements listed in MRP Provision C.10. A permit provision allegedly implementing the Resolution as applied to Test Claimants was not ripe for challenge as an unfunded mandate until it is adopted and imposed by the Regional Board, as it did when it implemented MRP Provision C.10.<sup>299</sup> Accordingly, Test Claimants have 12 months from the time the Regional Board required them to comply to submit their test claims. As Provision C.10 was effective December 1, 2009, and Test Claimants have submitted their test claim within 12 months of that date, Test Claimants' submission is timely.

The Regional Board's further argument that the measures implemented through MRP Provision C.10 "implemented numerous federal requirements" and thus constitutes a federal rather than state mandate is also meritless.<sup>300</sup> The Regional Board points to its prior argument, which has been rejected by the Commission on two prior occasions,<sup>301</sup> that the trash requirements are mandated by the Clean Water Act.<sup>302</sup> However, once again, the Regional Board points to no specific language of the Clean Water Act to support its position, nor does such language exist. Accordingly, Provision C.10 is not required by federal law, and therefore is a reimbursable state mandate.

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<sup>295</sup> *Id.*, at p. 54.

<sup>296</sup> *Id.*, at p. 53.

<sup>297</sup> Water Quality Control Policy for the Enclosed Bays and Estuaries of California, Resolution No. 95-84, November 16, 1995, p. 6.

<sup>298</sup> MRP, p. App I-71

<sup>299</sup> See Government Code § 17551(c), "test claims shall be filed not later than 12 months following the effective date of a statute or executive order," underlining added. See also Government Code § 17564(a), which requires claims to exceed \$1,000.00 before they can be submitted to the Commission for reimbursement.

<sup>300</sup> Regional Board Response, p. 54.

<sup>301</sup> See [Los Angeles Test Claim Decision] and [San Diego Test Claim Decision].

<sup>302</sup> Regional Board Response, p. 54.

### **E. Provisions C.11.f and C.12.f – Mercury And PCB Diversion Studies.**

Test Claimants contend provisions C.11.f and C.12.f of the MRP are reimbursable state mandates. MRP Provisions C.11.f and C.12.f require Test Claimants to evaluate the reduced loads of mercury and PCBs from pilot projects to divert dry weather and first-flush stormwater flows to sanitary sewers, and further requires Test Claimants to work together to implement a pilot project in each of the five counties in order to evaluate the load reductions. The Regional Board argues these provisions do not require a new program or higher levels of service, and are instead federal mandates.<sup>303</sup> These provisions do constitute a new program or higher level of service and are not federal mandates.

#### **1. MRP Provisions C.11.f And C.12.f Are New Programs Or Higher Levels of Service**

MRP Provisions C.11.f and C.12.f require Test Claimants to conduct specific diversion studies and pilot programs for mercury and PCBs. The Regional Board argues these measures are in line with the prior permits, which required control programs for these pollutants.<sup>304</sup> However, the level of service required by the previous control programs was far less than the MRP now requires for diversion studies and pilot programs.<sup>305</sup>

As the Regional Board notes, the San Mateo County Claimants' prior permit required them to "evaluat[e] the effectiveness of BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce [pollutants including mercury and PCBs] that may be causing or contributing to the exceedance of water quality standards," as well as implement a plan to "identify, assess, and manage controllable sources of PCBs and dioxin-like compounds found in urban runoff."<sup>306</sup> The Regional Board argues this language is equivalent to MRP provisions C.11.f and C.12.f.<sup>307</sup> However, once again the devil is in the details and the Regional Board not only ignores them, but also contorts the language of the prior permit for a far reaching conclusion: that through the iterative process, the term "evaluation" means requiring the above noted pilot programs and diversion studies. The Commission should not allow such broad interpretations of the permit language.

Similarly, the Alameda County Claimants were previously required to assess actions in order to reduce PCBs and mercury.<sup>308</sup> However, they were not required to include diversion to Publically Owned Treatments Works, a much different requirement than to assess actions.<sup>309</sup>

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<sup>303</sup> *Id.*, at p. 55.

<sup>304</sup> *Id.*

<sup>305</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 15, Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>306</sup> Regional Board Response, p. 56.

<sup>307</sup> *Id.*, at p. 54.

<sup>308</sup> Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

<sup>309</sup> *Id.*

In order to comply with this requirement, the Alameda County Claimants must spend an estimated additional \$162,455 in FY 2010-2012.<sup>310</sup>

Although Test Claimants have evidenced a substantial increase in costs, the Regional Board ignores that evidence and alleges that the MRP's "more detailed requirements were necessary to refine Claimants' existing programs to address mercury and PCBs contamination."<sup>311</sup> The burdensome new provisions cannot fairly be said to merely "refine" existing programs; the MRP adds new programs for diversion and studies that never existed before.<sup>312</sup> It is a new program arguably related to a TMDL implementation plan, which is not a federal requirement, as is set forth above, and is strictly a manifestation of state law developed under Water Code § 13242. Accordingly, MRP Provisions C.11.f and C.12.f are new programs or higher levels of service.

## 2. C.11.f And C.12.f Are Not Mandated by Federal Law.

The Regional Board argues that MRP Provisions C.11.f and C.12.f are federal mandates, and therefore are not reimbursable.<sup>313</sup> To support this argument, the Regional Board points to three separate requirements imposed by the Clean Water Act for discharge permits issued to local governments.<sup>314</sup>

First, MRP Provisions C.11.f and C.12.f require measures to be implemented to control all dry weather flows. The Regional Board asserts that because the Clean Water Act requires Test Claimants to effectively prohibit non-stormwater discharges into storm sewers, all dry weather flows are prohibited from being present in the MS4.<sup>315</sup> The Regional Board argues that "[d]ry weather flows are not included in the definition of "stormwater,"<sup>316</sup> thus such flows are prohibited."<sup>317</sup> This argument has several problems. First, there is no factual basis for the Regional Board's assumption that any flow in the MS4 during dry weather comes from a prohibited non-stormwater discharge. Many portions of the MS4 in San Mateo and Alameda Counties have flows during dry weather that do not, in fact, result from prohibited non-stormwater discharges.<sup>318</sup> Indeed, this fact is acknowledged and memorialized in Provision C.15a of the MRP, which expressly exempts the following unpolluted non-stormwater discharges:

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<sup>310</sup> Exhibit C to 2010 Declaration of James Scanlin.

<sup>311</sup> Regional Board Response, p. 56.

<sup>312</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 15.

<sup>313</sup> Regional Board Response, p. 57.

<sup>314</sup> *Id.*, at pp. 56-57.

<sup>315</sup> *Id.*, at p. 56.

<sup>316</sup> 40 C.F.R. 122.26(b)(13).

<sup>317</sup> Regional Board Response, p. 56.

<sup>318</sup> Exhibit E to 2011 Declaration of Jon Konnan, ¶ 16; Exhibit E to 2011 Declaration of James Scanlin, ¶ 21.

- (1) Flows from riparian habitats or wetlands;
- (2) Diverted stream flows;
- (3) Flows from natural springs;
- (4) Rising ground waters;
- (5) Uncontaminated and unpolluted groundwater infiltration;
- (6) Single family homes' pumped groundwater, foundation drains, and water from crawl space pumps and footing drains;
- (7) Pumped groundwater from drinking water aquifers; and
- (8) NPDES permitted discharges (individual or general permits).

Any and all of these exempted sources may be the reason for dry weather flow. In addition, Provision C.15.b allows conditionally exempted sources of non-stormwater discharges as well. Thus, the Regional Board is simply wrong in stating that all water flowing out of the MS4 during dry weather is prohibited.

Second, the Regional Board argues that the Mercury and PCB diversion studies are required to reduce the discharge of pollutants to the MEP. This claim is undercut by the Regional Board's admission that "the provisions are more specific than the federal laws and regulations that are cited in the permit."<sup>319</sup> By exercising its discretion as the NPDES permit writer, the Regional Board freely chose to implement costly and reimbursable state mandates.

Third, the Regional Board states that "stormwater permits must include such other provisions as the permitting agency determines is to be appropriate for the control of pollutants."<sup>320</sup> Of course, this is the crux of these entire test claims, and Test Claimants believe, as shown above in Sections II, III, and VI, that this contention is without merit. The Regional Board cannot simply state that any provision it deems necessary is automatically a federal mandate not subject to reimbursement by the state.

## **XI. Conclusion**

The documentation Test Claimants submitted to initiate these proceedings established that the MRP imposes numerous costly state mandates. The evidence concerning the magnitude of these costs is uncontested and the Regional Board has brushed the specifics of the differences between the prior permits and MRP to the side in favor of sweeping

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<sup>319</sup> Regional Board Response, p. 57.

<sup>320</sup> Id.



generalizations designed to intentionally avoid the relevant comparisons because they demonstrate that the challenged provisions represent new programs and/or requirements for higher levels of service. In fact, when appropriate scrutiny is applied, as shown above, the Regional Board's lengthy arguments that the MRP provisions at issue are either federal mandates or are not new programs or higher levels of service are factually and legally unsupported. These arguments are also the same arguments the Commission has rejected twice before. The Commission was correct and there has been no statutory change or new federal regulation promulgated in the interim period that should change the result for these test claims.<sup>321</sup> The Test Claimants therefore respectfully request that the Commission determine that the MRP provisions set forth in these test claims are reimbursable state mandates.

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<sup>321</sup> Again, Test Claimants note that the recent Los Angeles Superior Court decision is neither precedential nor final, and Test Claimants respectfully submit that it was wrongly decided.

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DECLARATION OF JON KONNAN

I, Jon Konnan, declare as follows:

1. I make this declaration in support of the Written Rebuttal Comments to Response to Test Claim No. 10-TC-01 submitted by the Cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco; the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside; the San Mateo County Flood Control District; and San Mateo County. Except where otherwise indicated, the facts set forth below are of my own personal knowledge, and if called upon to testify, I could and would competently testify to the matters set forth herein.

2. I have received the following degrees: Bachelor of Science in Microbiology, University of Florida; Master of Science in Environmental Engineering, Stanford University.

3. I am employed by EOA, Inc. as a Managing Engineer. For more than 11 years, I have served as the watershed monitoring and assessment coordinator for the San Mateo Countywide Water Pollution Prevention Program (“San Mateo Countywide Program” or “Program”).

4. The San Mateo Countywide Program is a consortium made up of the Cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco; the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside; the San Mateo County Flood Control District; and San Mateo County (collectively, the “Claimants”). The Program is governed by the City/County Association of Governments of San Mateo County (“C/CAG”), pursuant to a Joint Powers Agreement, and directly administered by the C/CAG’s NPDES Technical Advisory Committee, which consists of representatives from each of the Program’s 22 jurisdictions. Among other things, the C/CAG is responsible for adoption of an annual program-wide budget and establishes proportional cost-sharing allocations for each of the Claimants.

1           5.       As part of my position, I am responsible for designing, managing and  
2 implementing all aspects (e.g., sampling design, field work, analytical analysis, quality control,  
3 data management, interpretation and reporting) of water quality monitoring required by municipal  
4 stormwater National Pollutant Discharge Elimination System (“NPDES”) permits issued to the  
5 Claimants. Additionally, I assist Program participants and other Bay Area NPDES permittees in  
6 complying with NPDES requirements by planning and implementing a variety of projects related  
7 to identifying sources of and managing Bay Area water quality pollutants of concern (e.g., PCBs  
8 and mercury).

9           6.       The Claimants are subject to the Municipal Regional Stormwater NPDES Permit,  
10 issued by the Regional Quality Water Control Board (San Francisco Bay Region) (“Regional  
11 Board”), Order No. R2-2009-0074 (NPDES Permit No. CAS612008) (the “MRP”). I have  
12 reviewed the MRP and am familiar with its requirements.

13           7.       I have also reviewed and am familiar with the requirements of NPDES Permit No.  
14 CAS029921 issued by Order No. 99-059 on July 21, 1999, amended by Order No. R2-2003-0023  
15 on February 19, 2003, and Order Nos. R2-2004-0060 and R2-2004-0062 on July 21, 2004, and  
16 amended by Order R2-2007-0027 on March 14, 2007 (the “Prior Permit”), under which the San  
17 Mateo Countywide Program’s member agencies were permittees.

18           8.       I have also reviewed and am familiar with the requirements of the following plans  
19 and studies (collectively, the “Other Permit Programs”):

- 20           a.       Monitoring Program Plan for Fiscal Year 2004/05, San Mateo Countywide  
21                    Stormwater Pollution Prevention Program (STOPPP), March 1, 2004;
- 22           b.       FY 2003/04 Trash Control Work Plan, San Mateo Countywide Stormwater  
23                    Pollution Prevention Program (STOPPP), June 2003;
- 24           c.       Pilot Study to Identify Trash Sources and Management Measures at an In-  
25                    stream Trash Accumulation Area, San Mateo Countywide Stormwater  
26                    Pollution Prevention Program (STOPPP), August 2005;

- 1           d.     FY 2007/08 Trash Assessments in Urban Creeks in San Mateo County,  
2                     California, San Mateo Countywide Water Pollution Prevention Program  
3                     (SMCWPPP), August 2008;
- 4           e.     2006/07 Mid-fiscal Year Report, San Mateo Countywide Water Pollution  
5                     Prevention Program (SMCWPPP), February 22, 2007;
- 6           f.     Stormwater Management Plan, April 2004 - June 2010, San Mateo  
7                     Countywide Stormwater Pollution Prevention Program (STOPPP),  
8                     November 4, 2003; and
- 9           g.     Stormwater Pump Station Diversions Feasibility Evaluation, prepared for  
10                    the Bay Area Stormwater Management Agencies Association (BASMAA)  
11                    by Brown and Caldwell, December 1, 2010.

12           9.     Based on my understanding of the Prior Permit, the Other Permit Programs and the  
13 MRP, I believe the MRP requires the Claimants to perform new activities that are unique to local  
14 governmental entities that were not required by the Prior Permit or the Other Permit Programs.  
15 These new activities are set forth in more detail in the table provided in Exhibit E of this  
16 Declaration.

17           10.    I supervised a team of technical consultants to compile the information set forth in  
18 Exhibit E. We reviewed the Prior Permit, referenced in Paragraph 7 of this Declaration, the Other  
19 Permit Programs, references in Paragraph 8 of this Declaration, the MRP, referenced in Paragraph  
20 6 of this Declaration, Test Claim No. 10-TC-01 and its accompanying declarations and exhibits,  
21 and the evidence and argument submitted by the Regional Board in support of its Response to Test  
22 Claim No. 10-TC-01.

23           11.    The purpose of the table provided in Exhibit E of this Declaration is to allow the  
24 Commission on State Mandates Staff to review with ease the additional measures imposed on  
25 Claimants by the MRP, that the Regional Board incorrectly asserts are not new programs or higher  
26 levels of service.

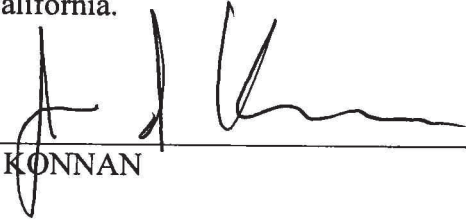
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12. I have personally reviewed the table provided in Exhibit E of this Declaration, and I am satisfied that the information in the table is accurate and was correctly compiled according to my instructions.

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

Executed September 15, 2011, at Oakland, California.

  
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JON KONNAN

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# **EXHIBIT E**

Exhibit E to the 2011 Declaration of Jon Konnan – San Mateo County Claimant Responses to the San Francisco Bay Water Board’s Comments

<b>Test Claim #: 10-TC-01</b>					
<b>Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u></b>					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
1.	C.8	RWB staff comments at p.28: <i>C.8 Claimants have argued that the Commission should compare the requirements in the Permit with those in the permits that were previously issued to each of them. That comparison does not include all applicable monitoring requirements to which the C.8 Claimants were subject. As discussed above Claimants were subject to mandatory requirements through their stormwater management plans, and annual workplans, and monitoring programs and plans. Those documents contained many requirements concerning monitoring, which although developed after their permits were adopted were nevertheless prospectively incorporated into their permits.</i>	The quantitative estimates provided in Exhibit A to the 2010 Declaration of Jon Konnan describe the associated costs for the increased levels of effort and capital expenditure required by the new provisions required by the MRP. The financial figures were based upon actual work performed under the prior permit that was entirely consistent with the “management plans, monitoring programs and annual reports.” All applicable monitoring requirements were included in the comparison between prior permits and MRP Provision C.8.	Test Claim #: 10-TC-01  Declarations of Jon Konnan in support of 10-TC-01.	p.12-24  p. 2-5, 7
2.	C.8.b	RWB staff comments at p.30: <i>...C.8 Claimants contend that Provision C.8.b requires a higher level of service in part because the Provision requires that Permittees participate in a monitoring program designed to answer specified questions about conditions in the San Francisco Estuary. The San Francisco Bay Water Board disagrees that the Provision imposes a higher level of service with respect to the questions to be addressed through the required monitoring. C.8 Claimants have not provided any explanation about the monitoring that they believe is required under the Provision that was not required by their past permits. The Provision is intended to maintain the same level of monitoring that Permittees have been addressing through the monitoring they have conducted under their</i>	MRP Provision C.8.b requires Permittees to participate in the San Francisco Estuary Regional Monitoring Program (“RMP”) or and equivalent program. Permittees are required to participate in such a monitoring program by paying their “fair share” of monitoring costs. These requirements impose a higher level of service because the scope of the RMP has changed since the previous permit, focusing more heavily on Permit-related monitoring requirements. Permittees will collectively incur increased costs due to the increase in the level of participation required to coordinate Permit-related monitoring requirements with the RMP (or equivalent).	Test Claim #: 10-TC-01  Declarations of Jon Konnan in support of 10-TC-01.	p.12, 24  p. 2, 7

Exhibit E to the 2011 Declaration of Jon Konnan – San Mateo County Claimant Responses to the San Francisco Bay Water Board’s Comments

<b>Test Claim #: 10-TC-01</b>					
<b>Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u></b>					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
		<i>past permits.</i>			
3.	C.8.c	<p>RWB staff comments at p.31: <i>Alameda, Brisbane and the County of Santa Clara argue that provision C.8.c greatly increases the number of monitoring sites and parameters from those included in their past permits. Additionally, Brisbane and the County of Santa Clara assert that the Provision expands the number of creek sites that must be monitored.</i></p> <p>RWB staff comments at p.33: <i>...Brisbane was subject to status monitoring requirements through the stormwater management plan and annual reports submitted on behalf of San Mateo County MS4 dischargers by SMCWPPP. San Mateo County Permittees were required to "assess urban runoff-related characteristics of representative watersheds in San Mateo County. Assessments will typically focus on using environmental indicators...to characterize the functional attributes of creeks and potential for stormwater impacts..." SMCWPPP submitted annual workplans that indicated that Permittees would "perform chemical, biological and/or physical monitoring in selected San Mateo County watersheds." The multi-year plan and workplans clearly indicate that Brisbane and other San Mateo County Permittees was already subject to status monitoring requirements under its prior permit. Provision C.8.c refined those requirements by adding more specificity to the prior permit status monitoring requirements and resulting multiyear plan and</i></p>	<p>Provision C.8.c of the MRP requires the City of Brisbane and other San Mateo County Permittees to substantially increased levels of monitoring relative to the prior permit. Specifically, C.8.c requires many more field samples and analysis for many more parameters than the monitoring measures required under the prior permits. Compared to the San Mateo County Permittees' most recent Monitoring Program Plan under the former permit, 16 new parameters are required under the MRP. Cost estimates provided in Exhibit A to the 2010 Declaration of Jon Konnan represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the monitoring specified in detail in Provision C.8.c. These estimates account for increased costs for field crews and associated field equipment and increased analytical laboratory costs.</p> <p>For example, General Water Quality measurements now require use of a continuous data logger. The new method generates a continuous record of readings from over 2,500 individual time intervals, requiring additional staff time to download the data and calculate interpretive statistics as well as performance of additional maintenance and calibration for the required multi-parameter probe before and after each deployment. Two field visits are required for installation and deployment, in addition to equipment maintenance and calibration between deployments. In addition, bioassessment (the</p>	<p>Test Claim #: 10-TC-01</p> <p>Declarations of Jon Konnan in support of 10-TC-01.</p> <p>Monitoring Program Plan for Fiscal Year 2004/05, STOPPP, March 1, 2004.</p>	<p>p.13, 24</p> <p>p. 2, 3, 7</p> <p>p.3</p>



Exhibit E to the 2011 Declaration of Jon Konnan – San Mateo County Claimant Responses to the San Francisco Bay Water Board’s Comments

Test Claim #: 10-TC-01 Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u>					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
		<i>workplans, but it does not increase those requirements.</i>	<p>collection of aquatic organisms to evaluate community structure and stream condition) at most urban sites was previously limited to two main components: collection of a benthic macroinvertebrate sample and completion of a two page visual assessment for 10 physical habitat attributes. The MRP requires an expanded Surface Water Ambient Monitoring Program (SWAMP) protocol which adds collection and processing of four different types of algae samples, as well as quantitative measurements or scoring for over 20 different physical habitat parameters at a minimum of 10 transects within each site. These field measurements are recorded on a 26 page set of field forms. Using the old protocol, a 2-person team typically sampled 4 to 6 sites per day, while the new MRP protocol requires at least 4 to 6 hours for a 3 to 4 person team to complete one site.</p> <p>San Mateo County Permittees must also increase the number of Biological Assessment sampling sites required by approximately 26%, from an average of 4.8 under the prior permit to 6 under the MRP.</p> <p>It should be noted that the quantitative estimates provided in the Test Claim of levels of effort and associated costs under the prior permit were based upon actual work performed under the prior permit that was entirely consistent with the management plans, monitoring programs and annual reports associated with the prior permits.</p>		

Exhibit E to the 2011 Declaration of Jon Konnan – San Mateo County Claimant Responses to the San Francisco Bay Water Board’s Comments

Test Claim #: 10-TC-01 Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u>					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
4.	C.8.d	<p>RWB staff comments at p.34: <i>Provision C.8.d.i details the monitoring that Permittees must conduct in the event long term monitoring results indicate that a Permittee's discharge exceeds a water objective, toxicity threshold, or other "trigger." Alameda, Brisbane and the County of Santa Clara contend that there are no comparable requirements in their prior permits. The San Francisco Bay Water Board disagrees that Provision C.8.d.i imposes a new program or level of service. In fact Provision C.8.d.i sets forth more detail about the requirements which the C.8.d Claimants were already required to follow in Provision C.1 of their prior permits.</i></p> <p>RWB staff comments on p.35: <i>Provision C.8.d.ii requires that Permittees investigate the effectiveness of one best management practice (BMP) for stormwater treatment or hydrograph modification control. ...Alameda, Brisbane and the County of Santa Clara argue that Provision C.8.d.ii imposes a new program or higher level of service. In fact it is consistent with their previous permits. Each of the C.8 Claimants was previously required to conduct monitoring designed in part to achieve "evaluation of effectiveness of representative stormwater pollution prevention or control measures."</i></p> <p><i>Provision C.8.d.iii requires that Permittees monitor a waterbody within each county to determine "how and where creeks can be restored or protected to cost-</i></p>	<p>The requirements of MRP Provision C.8.d are new to the City of Brisbane and other San Mateo County Permittees. Specifically, Provision C.8.d requires design and implementation of more field studies and associated sampling and analysis than the monitoring conducted under the prior permits. Cost estimates provided in Exhibit A to the 2010 Declaration of Jon Konnan represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the monitoring specified in detail in Provision C.8.d. Specifically, if certain triggers occur, the MRP now requires specific and expensive studies to be conducted that were neither required nor implemented under C.1 of the previous permit. These estimates account for increased costs for required project design, fieldwork, sampling and laboratory analysis, interpretation and reporting.</p> <p>Also, although the San Mateo County Claimants do not need to conduct more than 3 investigation projects under the MRP, no such investigations occurred under the prior permit term.</p> <p>It should be noted that the quantitative estimates provided in the Test Claim of levels of effort and associated costs under the prior permit were based upon actual work performed under the prior permit that was entirely consistent with the management plans, monitoring programs and annual reports associated with the prior permits.</p>	<p>Test Claim #: 10-TC-01</p> <p>Declarations of Jon Konnan in support of 10-TC-01.</p>	<p>p.14, 15, 24</p> <p>p. 3, 7</p>

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Test Claim #: 10-TC-01 Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u>					
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		<i>effectively reduce the impacts of pollutants, increased flow rates, and increased flow durations of urban runoff..." C.8 Claimants' prior permits did not include a monitoring requirement expressly described as a "Geomorphic Project" monitoring requirement. Instead their prior permits were amended to included related requirements to develop and implement hydromod-ification management plans and to monitor the effectiveness of hydromodification control measures. Provision C.8.d.iii provides added specificity to those requirements but does not result in a new program or higher level of service.</i>			
5.	C.8.e.i, C.8.e.ii, and C.8.e.vi	RWB staff comments at p.36: <i>Provision C.8.e.i requires that Permittees monitor for pollutants of concern at locations specified in the Permit. It provides in the alternative that upon approval by the San Francisco Bay Regional Board's Executive Officer, Permittees may use alternate monitoring locations. As stated in C.8.e.i, the purpose of pollutants of concern monitoring is to meet four priority management information needs: 1) identifying which Bay tributaries (including stormwater conveyances) contribute most to Bay impairment from pollutants of concern; 2) quantifying annual loads or concentrations of pollutants of concern from tributaries to the Bay; 3) quantifying the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and 4) quantifying the projected impacts of management actions (including control measures) on tributaries and identifying where these</i>	The requirements of MRP Provisions C.8.e.i, C.8.e.ii, and C.8.e.vi are new to the City of Brisbane and other San Mateo County Permittees. Specifically, Provision C.8.e.i, C.8.e.ii, and C.8.e.vi require design and implementation of more field studies and associated sampling and analysis than the monitoring conducted under the prior permits. Cost estimates provided in Exhibit A to the 2010 Declaration of Jon Konnan represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the monitoring specified in detail in Provisions C.8.e.i, C.8.e.ii, and C.8.e.vi. These estimates account for increased costs for required project design, field work, sampling and laboratory analysis, interpretation and reporting.  For example, the City of Brisbane and other San Mateo	Test Claim #: 10-TC-01  Declarations of Jon Konnan in support of 10-TC-01.	p.15-17, 24  p. 3, 4, 7

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		<p><i>management actions should be implemented to have the greatest beneficial impact. Santa Clara County and Brisbane assert that the provision establishes a new program because their prior permits did not include a comparable provision.</i></p> <p><i>C.8.e.i is not a new program or higher level of service. C.8 Claimants' prior permits required monitoring for pollutants of concern. Those permits required that Alameda, Brisbane and Santa Clara County implement monitoring programs that would characterize "representative drainage areas and stormwater discharges, including land use characteristics pollutant concentrations and mass loadings", assess "existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater dischargers, including an evaluation of representative receiving waters", and evaluate "effectiveness of representative stormwater pollution prevention or control measures.</i></p> <p><i>Provision C.8.e.ii requires that Permittees conduct Long-Term monitoring at stations listed in the Permit. The Permit authorizes Permittees to conduct monitoring at alternate locations upon approval by the San Francisco Bay Water Board's Executive Officer. Provision 8.e states that Long-Term monitoring is "intended to assess long-term trends in pollutant concentrations and toxicity in receiving waters and sediment, in order to evaluate if stormwater discharges are causing or contributing to toxic impacts on aquatic</i></p>	<p>County Permittees will be required to add 2 additional monitoring stations in order to comply with the MRP (or implement an alternate plan with an equivalent level of effort). This will require substantial funds to construct operate, and maintain. The 2 new field sampling stations will need multiple autosamplers, accessory tubing, cables, batteries and sample bottles, security enclosures, and solar panels, all of which require ongoing maintenance. Analysis for many of the parameters is costly and provided by very few commercial laboratories. For example, accurate methods for measuring the pesticide fipronil have only been published in the last 5-10 years and there is no commercial market incentive for laboratories to offer this service at low cost. It is likely that several different labs would be needed to provide SWAMP-comparable results as required by the MRP. The deployment of the above equipment and the above lab work was neither required nor implemented under the previous permit.</p> <p>It should be noted that the quantitative estimates provided in the Test Claim of levels of effort and associated costs under the prior permit were based upon actual work performed under the prior permit that was entirely consistent with the management plans, monitoring programs and annual reports associated with the prior permits.</p>		

Exhibit E to the 2011 Declaration of Jon Konnan – San Mateo County Claimant Responses to the San Francisco Bay Water Board’s Comments

Test Claim #: 10-TC-01 Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u>					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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		<p>life."</p> <p>RWB staff comments at p.37: <i>Alameda, Brisbane and the County of Santa Clara contend that provision C.8.e.ii is a new program and state that their prior permits did not include a provision that required monitoring to detect long term trends. In fact C.8 Claimants' prior permits required monitoring of long term trends.</i></p> <p><i>Provision C.8.e.vi requires that Permittees develop a design for a sediment delivery estimate/sediment budget in local tributaries and urban drainages. Permittees are required to implement the study by July 1,2011. Alameda, Brisbane and the County of Santa Clara argue that Provision C.8.e.vi is a new program in that their prior permits did not require them to design or implement sediment deliver studies. The San Francisco Bay Water Board agrees that the C.8 Claimants' prior permits did not require them to design or implement sediment delivery studies. The Provision added further specificity to the monitoring requirements included in C.8 Claimants' prior permits.</i></p>			
6.	C.8.f	<p>RWB staff comments at p.38: <i>Alameda, Brisbane and Santa Clara County assert that the Provision imposes a new program in that their prior permits did not include similar provisions. Alameda and Brisbane were both subject to similar requirements through the plans prepared to implement their prior permits.</i></p>	<p>MRP Provision C.8.f requires the City of Brisbane and other San Mateo County Permittees to encourage citizen monitoring. Specifically, Provision C.8.f requires new efforts that were not conducted under the prior permit including making reasonable efforts to seek out citizen and stakeholder information and comment regarding</p>	<p>Test Claim #: 10-TC-01</p> <p>Declarations of Jon Konnan in support of</p>	<p>p.17, 18, 24</p> <p>p.4, 5, 7</p>

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		RWB staff comments at p.39: <i>...Brisbane and other San Mateo County Permittees were required to encourage citizen monitoring through their countywide stormwater program's stormwater management plan. The plan provides that the Permittees shall "develop and implement Integrated Outreach Approaches" and that they shall "identify and support a "Friends of a (a watershed)" group and encourage creek (lagoon or shoreline) cleanups, or adopt-a-creek or other volunteer monitoring and resource inventorying activities." Brisbane's prior permit clearly required it to conduct citizen outreach requirements that were equivalent to those required by the Provision c.8.f.</i>	<p><u>water body function and quality</u> and annually demonstrating encouragement of citizen and stakeholder observations and reporting of <u>water body conditions</u>.</p> <p>Cost estimates provided in Exhibit A to the 2010 Declaration of Jon Konnan represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the activities specified in Provision C.8.f. There are no specific increases in number of monitoring sites or parameters associated with this provision, but the level of coordination (i.e., program staff time) required is greater than the level under the prior permit.</p>	10-TC-01.	
7.	C.8.h	<p>RWB staff comments at p.40: <i>Provision C.8.h provides that where applicable monitoring data must be "SWAMP comparable". SWAMP is the State Water Board's Surface Water Ambient Monitoring Program (SWAMP) which was created to assess the conditions of surface waters throughout California and coordinate all water quality monitoring conducted by the State and Regional Water Boards. The Provision requires that "minimum data quality shall be consistent with the latest version of the SWAMP Quality Assurance Project Plan (QAPP)." This statement is a clarification of what must be done to ensure that monitoring data are "SWAMP comparable".</i></p> <p>RWB staff comments at p.41: <i>Claimants Alameda,</i></p>	<p>Provision C.8.h requires that where applicable, monitoring data must be SWAMP comparable. Minimum data quality shall be consistent with the latest version of the SWAMP Quality Assurance Project Plan (QAPP) for applicable parameters, including data quality objectives, field and laboratory blanks, field duplicates, laboratory spikes, and clean techniques, using the most recent standard operating procedures.</p> <p>The prior permit makes no mention of the SWAMP program. By contrast, Provision C.8.h of the MRP requires the San Mateo Program to develop significant updates or additions to existing field standard operating procedures and train field staff to allow for monitoring data to be collected by the Permittees using “SWAMP</p>	<p>Test Claim #: 10-TC-01</p> <p>Declarations of Jon Konnan in support of 10-TC-01.</p>	<p>p. 19, 24</p> <p>p.5, 7</p>

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Test Claim #: 10-TC-01 Municipal Regional Stormwater Permit Provision: <u>Monitoring (C.8)</u>					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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		<p><i>Brisbane and County of San Mateo argue that Provision C.8.h imposes a higher level of service. They note that their prior permits did not mention the SWAMP program. C.8 Claimants assert that the provision requires that they develop significant updates or additions to existing field standard operating procedures and train field staff regarding collection of data using methods that are compatible with the SWAMP program. They further contend that new data management systems must be developed and managed. C.8 Claimants argue that monitoring data quality assurance procedures will have to be developed, documented and then they will have to adhere to them.</i></p> <p><i>The San Francisco Bay Water Board agrees that the C.8 Claimants' prior permits did not expressly require that monitoring data had to be SWAMP comparable. Nevertheless...the prior permits had requirements to assure the quality of monitoring data used to assess conditions in surface water, and the new Permit requirement that where applicable monitoring data must be "SWAMP comparable" is equivalent to the prior permits' quality assurance requirements.</i></p>	<p>comparable” methods defined by SWAMP. Additionally, new data management systems must be developed and managed at significant costs, as the MRP requires data to be reported electronically to the Regional Water Board in “SWAMP comparable” formats. Monitoring data quality assurance procedures (also SWAMP comparable) will also have to be developed, documented and adhered to by the San Mateo Program at all times, which requires an additional level of effort (staff time) compared to previous quality assurance procedures conducted by San Mateo Program under the prior permit. Cost estimates provided in Exhibit A to the 2010 Declaration of Jon Konnan represent the projected <u>increase in costs</u> that the Permittees will incur due to increased level of effort required by C.8.h. These cost increases support the assertion that quality assurance requirements under the previous permits were not equivalent to those under the MRP Provision C.8.h. Rather, a higher level of effort related to quality assurance is required under C.8.h.</p>		

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<b>Test Claim #: 10-TC-01</b>					
<b>Municipal Regional Stormwater Permit Provision: <u>Trash (C.10)</u></b>					
	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
8.	C.10.a.i	<i>On page 49 of their responses to the Test Claim, the Water Board asserts the City of Brisbane, as a participant to the San Mateo Countywide Water Pollution Control Program (SMCWPPP), prepared a work plan for trash control via its FY 2003-03 Trash Control Work Plan with the intent that the work plan was to begin developing and implementing a strategy to address trash problem areas in urban water bodies in San Mateo County (including the City of Brisbane). Based on these factors, the Water Board believes that Provision C.10.a.i does not impose a new program or higher level of service on the City of Brisbane because the City was required to develop a plan for trash control under its prior permit.</i>	<p>Provision C.10.a.i requires the City of Brisbane and the other San Mateo County Permittees to develop and implement a Short-Term Trash Reduction Plan that will attain a 40% trash load reduction from its storm drainage system. This requirement poses a significantly higher level of service upon the City and other San Mateo County Claimants than the level of service required under prior permits because <u>only new and increased levels of control measure implementation can be used to demonstrate the 40% reduction</u>. Based on the language in the provision, load reductions associated with control measures (e.g., typical street sweeping and storm drain inlet maintenance) implemented during prior permits under previous work plans cannot be used to demonstrate required load reduction goals (i.e., 40%). Cost estimates provided in Exhibit B to the 2010 Declaration of Jon Konnan are based on the projected <u>increase in costs</u> due to the required implementation of new control measures (i.e., programs) and increased levels of implementation (i.e., higher level of services) that the City will incur based on provision C.10.a.i (see Exhibit B to the 2010 Declaration of Jon Konnan).</p> <p>For example, it is anticipated that the City of Brisbane and the other San Mateo County Permittees will need to include in their Short Term Plans substantial new trash control measures to achieve a 40% reduction in trash by July 1, 2014. Each city will need to develop</p>	<p>City of Brisbane Test Claim #10-TC-01</p> <p>Declarations of Jon Konnan in support of Test Claim</p> <p>Exhibit B to the 2010 Declaration of Jon Konnan</p>	<p>p. 25</p> <p>p. 5-6, 8-9</p> <p>p. 1-2</p>



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Test Claim #: 10-TC-01					
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	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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			and implement a suite of new and/or enhanced control measures to meet this reduction goal, selecting from measures such as targeted enforcement of illegal dumping activities (may require the hiring of police officers); City staffing increases needed to establish ordinances that prohibit the distribution of single use plastic grocery bags and polystyrene food ware; new or enhanced street sweeping programs that require additional staffing, equipment and/or contract resources to increase sweeping frequencies in trash-prone areas; and enhanced public education and outreach programs designed to reduce littering.		
9.	C.10.a.ii	<i>On page 50 of their responses to the Test Claim, the Water Board asserts that the City of Brisbane was required to report on street sweeping and storm drain inlet cleaning results in prior permits, and therefore Provision C.10.a.ii does not impose a new program or higher level of service.</i>	Provision C.10.a.ii requires the City of Brisbane to determine their baseline trash load from its storm drainage system and develop a load reduction tracking method to demonstrate progress and attainment of trash load reduction levels. No requirements in prior permits issued to the City, nor plans developed by the City or San Mateo Countywide Water Pollution Prevention Program (SMCWPPP), on behalf of the City or other SMCWPPP members, included provisions or tasks to develop baseline trash loading estimates or load reduction tracking methodologies. Furthermore, based upon the language in provision C.10.a.ii, submittals of street sweeping data required by prior permits do not constitute a “baseline trash load” nor a “trash reduction tracking method”. Therefore, these new requirements impose a new program on the City and San Mateo County Claimants, at significant costs that are provided in the	City of Brisbane Test Claim #10-TC-01  Declarations of Jon Konnan in support of Test Claim  Exhibit B to the 2010 Declaration of Jon Konnan	p. 25-26  p. 5-6, 8-9  p. 1-2

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<b>Test Claim #: 10-TC-01</b>					
<b>Municipal Regional Stormwater Permit Provision: <u>Trash (C.10)</u></b>					
	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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			Test Claim and associated declarations (see Exhibit B to the 2010 Declaration of Jon Konnan).		
10.	C.10.a.iii	<i>On page 51 of their responses to the Test Claim, the Water Board asserts that Provision C.10.a.iii includes more specificity than was required in claimants' prior permits, but does not impose a new program or higher level of service. However, no evidence of such prior requirements on City of Brisbane is provided in the Water Board responses.</i>	Provision C.10.a.iii requires that the City of Brisbane and the other San Mateo County Permittees install and maintain a mandatory minimum number of trash full capture devices that are designed to treat stormwater from 5 acres of urbanized area. Purchasing, installation and on-going maintenance of these devices pose significant costs to the City and the other San Mateo County Permittees. The City and the other San Mateo County Permittees have not implemented full capture trash devices under prior permits, and will be required to develop new programs in order to comply with the MRP. Costs associated this new program are described in the Test Claim and associated declarations (see Exhibit B to the 2010 Declaration of Jon Konnan).	City of Brisbane Test Claim #10-TC-01  Declarations of Jon Konnan in support of Test Claim  Exhibit B to the 2010 Declaration of Jon Konnan	p. 26  p. 6, 8-9  p. 1-2
11.	C.10.b.i & b.ii	<i>On pages 51 and 52 of their responses to the Test Claim, the Water Board asserts that the City of Brisbane, as a member of the SMCWPPP, participated in required creek cleanups as part of trash assessments, and therefore Provisions C.10.b.i and C.10.b.ii do not impose a new program or higher level of service</i>	Under provision C.10.b.i and ii, the City of Brisbane is required to identify and submit information and photo documentation on trash hot spots to the Water Board. Prior permits did not require the identification and submittal of information to the Water Board regarding trash hot spots. Creek cleanups conducted by SMCWPPP during the timeframes overlapping with previous permits were done so on a voluntary basis at a pilot scale to evaluate trash assessment methodologies. A new program must be developed in order to comply with the MRP. Costs associated with this new program are provided in the Test Claim and associated declarations (see Exhibit B to the 2010 Declaration of Jon Konnan).	City of Brisbane Test Claim #10-TC-01  FY 2003/04 Trash Control Work Plan, STOPPP, June 2003.  Pilot Study to Identify Trash Sources and Management Measures at an In-stream Trash Accumulation Area, STOPPP, August	p. 27  p. 5-6, 8-9  p. 1-2

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	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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			Also, the City of Brisbane and the other San Mateo County Permittees were required to expend considerable staff time and associated resources. For example, hot spot selection guidance was developed to assist the County and other municipalities in selecting their hot spots and numerous work group meetings with municipal staff were conducted to coordinate this work.	2005.  FY 2007/08 Trash Assessments in Urban Creeks in San Mateo County, California, SMCWPPP, August 2008.  Declarations of Jon Konnan in support of Test Claim  Exhibit B to the 2010 Declaration of Jon Konnan	
12.	C.10.b.iii	<i>On page 52 of their responses to the Test Claim, the Water Board asserts that under their prior permit the City of Brisbane, through SMCWPPP, completed clean-up and assessments of stream locations that would qualify as trash hot spots, and were subject to requirements to use assessment methods that were similar if not more involved than the trash assessment methods required in Provision C.10.b.iii. Based on these factors, the Water Board states that Provision C.10.b.iii does not impose a new program or higher level of service.</i>	Under provision C.10.b.iii, the City of Brisbane is required to clean up (to a standard of no-visual impact) and assess 3 trash hot spots located in the City. Under prior permits, SMCWPPP member agencies were not required to conduct trash hot spot cleanups or assessments. Rather, SMCWPPP members participated in <u>voluntary</u> cleanups in creeks at a pilot scale, which was primarily designed to identify types of trash found in creeks and sources and to further evaluate trash assessment methodologies, not to actually clean the trash in creeks. Accordingly, a new program must be developed in order to comply with the MRP. Costs associated with this new program are provided in the Test Claim and	City of Brisbane Test Claim #10-TC-01  FY 2003/04 Trash Control Work Plan, STOPPP, June 2003.  Pilot Study to Identify Trash Sources and Management Measures at an In-stream Trash Accumulation Area, STOPPP, August	p. 27  p. 6, 8-9  p. 1-2

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Municipal Regional Stormwater Permit Provision: <u>Trash (C.10)</u>					
	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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			associated declarations (see Exhibit B to the 2010 Declaration of Jon Konnan).	2005.  FY 2007/08 Trash Assessments in Urban Creeks in San Mateo County, California, SMCWPPP, August 2008.  Declarations of Jon Konnan in support of Test Claim  Exhibit B to the 2010 Declaration of Jon Konnan	
13.	C.10.c.	<i>On page 53 of their responses to the Test Claim, the Water Board asserts that although the City of Brisbane conducted planning efforts for short-term trash reduction, the City was not previously required to produce long-term trash reduction plans. Thus, the Water Board states that Provision C.10.c sets forth more specific requirements than were included in prior permits but it does not impose a new program or higher level of service.</i>	Provision C.10.c requires the City and the other San Mateo County Permittees to develop a long-term plan for trash reduction that is designed to attain trash load reductions in future permit terms. No requirements in prior permits or plans required the City or the other San Mateo County Permittees to develop a long-term plan. Furthermore, previous plans developed by San Mateo County Permittees, through SMCWPPP, were intended to plan trash assessment and source characterization activities, <u>not</u> new or enhanced control measures that are required by provision C.10.c. Accordingly, a new program must be implemented in order to comply with the MRP. Costs associated with this new program are provided	City of Brisbane Test Claim #10-TC-01  FY 2003/04 Trash Control Work Plan, STOPPP, June 2003.  Declarations of Jon Konnan in support of Test Claim  Exhibit B to the 2010 Declaration of Jon Konnan	p. 27-28     p. 6, 8-9   p. 1-2

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Test Claim #: 10-TC-01					
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	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
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			in the Test Claim and associated s (see Exhibit B to the 2010 Declaration of Jon Konnan).		
14.	C.10.d	<i>On page 53 of their responses to the Test Claim, the Water Board asserts that the City of Brisbane reported on their municipal maintenance activities and stream assessment and cleanup activities in their annual reports and other reports, and although the requirements for reporting in C.10.d. are different than previous reporting requirements and provide more specificity, they do not impose a new program or higher level of service.</i>	Provision C.10.d requires the City of Brisbane and the other San Mateo County Permittees to provide a summary of: 1) their trash load reduction actions; 2) the total trash loads and dominant types of trash removed by each of their actions; and 3) the percent annual trash load reduction relative to their baseline loads. These reporting requirements go well beyond the reporting requirements in prior permits, of which <u>none were associated with trash reduction</u> . Furthermore, the type of reporting required by the MRP was never before reported to, let alone required by, the Regional Board. As a result, a new program must be developed in order to comply with the MRP. Costs associated with this new program are provided in the Test Claim and associated declarations (see Exhibit B to the 2010 Declaration of Jon Konnan).	City of Brisbane Test Claim #10-TC-01  Declarations of Jon Konnan in support of Test Claim  Exhibit B to the 2010 Declaration of Jon Konnan	p. 28  p. 6, 8-9  p. 1-2

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	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
15.	C.11/C.12.f	<p>RWB staff comments at p.55: <i>Alameda, Brisbane and Santa Clara County argue that Provisions C.11.f and C.12.f are new programs. In fact C.11/C.12 Claimants' prior permits required that they develop and implement control programs for mercury and PCBs.</i></p> <p>RWB staff comments at p.56: <i>Brisbane's prior permit required that it prepare a report that included an "evaluation of...the effectiveness of BMPS that are currently being implemented and additional BMPs that will be implemented to prevent or reduce pollutants including mercury and PCBs pollutants that may be causing or contributing to the exceedance of water quality standards... The report was also required to include a plan to implement pollution reduction and control measures and further required that permittees implement pollutant reduction and control measures...</i></p> <p><i>When the San Francisco Bay Water Board issued the Permit it determined that more detailed requirements were necessary to refine Claimants' existing programs to address mercury and PCBs contamination. That approach was consistent with the iterative approach required to meet the MEP standard under federal law. Thus, the Board did not require that Claimants implement a new program but instead provided further detail in implementing the minimum federal</i></p>	<p>MRP Provisions C.11/12.f. require that Permittees evaluate the reduced loads of mercury and PCBs from pilot projects to divert dry weather and first-flush stormwater flows to sanitary sewers. Provisions C.11/12.f. further provide that Permittees shall work together to implement one pilot project in each of five counties to evaluate those load reductions. The prior permits contained no provisions requiring the diversion studies and pilot programs for mercury and PCBs required under the MRP. The studies and pilot projects required under sections C.11/12.f are new programs. Cost estimates provided in Exhibit C to the 2010 Declaration of Jon Konnan represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement these new control measures as specified in detail in MRP Provisions C.11/12.f.</p> <p>Furthermore, SMCWPPP's work plans included a task to develop and implement control programs to reduce specific pollutants of concern such as PCBs and mercury; however, the work plans did not include diversion to POTWs as an option. Rather, the efforts conducted by Permittees to implement pollution reduction and control measures per the previous permit requirements focused on characterization of pollutant distributions and sources. This type of work is continuing under a separate MRP Provision (C.11/12.c) at a greater level of effort than under the</p>	<p>Test Claim #: 10-TC-01</p> <p>Declaration of Jon Konnan in support of 10-TC-01.</p> <p>2006/07 Mid-fiscal Year Report, SMCWPPP, February 22, 2007</p> <p>Stormwater Management Plan, April 2004 - June 2010, STOPPP,</p>	<p>p. 32-34</p> <p>p.9</p> <p>p.7</p> <p>p.6-7</p>

Exhibit E to the 2011 Declaration of Jon Konnan – San Mateo County Claimant Responses to the San Francisco Bay Water Board’s Comments

Test Claims #: 10-TC-01 Municipal Regional Stormwater Permit Provision: Mercury and PCBs - Diversion to POTWs (C.11/C.12.f)					
	MRP Provision	Summary and Page # of Water Board’s Comment on Test Claim	Claimant’s Response	Supporting Documentation	
				Reference	Page #
		<i>MEP standard and added specificity to already existing BMPs.</i>	previous permits. Thus the studies and pilot projects required under sections C.11/12.f are entirely new programs for the Permittees.	November 4, 2003.	
16.		<i>RWB staff comment at p.56: First, the CWA requires that stormwater permits must require that permittees effectively prohibit non-stormwater discharges into storm sewers. The challenged Provisions relate to dry weather flows. EPA has defined "storm water" to mean "storm water runoff, snow melt runoff and surface runoff and drainage." Dry weather flows are not included in the definition of "stormwater", thus such flows are prohibited.</i>	Prohibition of all dry weather flows is not feasible. MRP Provision C.15 recognizes this and exempts unpolluted non-stormwater discharges (e.g., springs and groundwater-related discharges) from MRP Discharge Prohibition A.1 and also conditionally exempts non-stormwater discharges that are potential sources of pollutants (e.g., car washing, irrigation). Many portions of the MS4 in San Mateo County have flows during dry weather that do not result from prohibited non-stormwater discharges.	MRP	p.107
17.		<i>RWB staff comment at p.57: Provisions C.11.f and C.12.f are additionally required under federal law because they are necessary to implement the wasteload allocations assigned to stormwater dischargers in Total Maximum Daily Loads (TMDLs) for mercury.</i>	There is no technical basis for the assertion that stormwater diversions to POTWs are necessary to meet TMDL allocations. To the contrary, available information indicates that this control measure is not effective. Based upon the scenarios evaluated, very high unit costs were estimated (\$23,500 to \$1,600,000 per gram of PCBs removed) with removal of only a very small fraction (0.0006 to 0.008 percent) of the current estimated total load of PCBs discharged to the Bay in stormwater runoff.	Stormwater Pump Station Diversions Feasibility Evaluation, prepared for BASMAA by Brown and Caldwell, December 1, 2010.	p.ES-2 (Exec. Sum.)

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DECLARATION OF JAMES SCANLIN

I, James Scanlin, declare as follows:

1. I make this declaration in support of the Written Rebuttal Comments to Response to Test Claim No. 10-TC-02 submitted by the Cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro and Union City; the County of Alameda; the Alameda County Flood Control and Water Conservation District (the "District"); and Zone 7 of the District (collectively, "Claimants"). Except where otherwise indicated, the facts set forth below are of my own personal knowledge, and if called upon to testify, I could and would competently testify to the matters set forth herein.

2. I have received the following degrees: Bachelor of Science in Political Economy of Natural Resources, University of California, Berkeley; Master of Public Administration, California State University, East Bay; Registered Environmental Assessor, State of California.

3. I am employed by the Alameda County Public Works Agency as an Associate Environmental Compliance Specialist. In that position, I serve as lead staff member working on behalf of the District, a division of the Public Works Agency, for the Alameda Countywide Clean Water Program ("Alameda Countywide Program" or "Program"). The District has the responsibility to administer and coordinate the Alameda Countywide Program.

4. The Alameda Countywide Program is a consortium made up of the Cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro and Union City; the County of Alameda; the District, and Zone 7 of the District (collectively, the "Consortium"). The Program was created in 1991 through a Memorandum of Agreement ("MOA"). Among other things, the MOA established a General Program, which carries out activities in common on behalf of the Consortium. The MOA also established a management structure and funding mechanism to carry out general Programs activities.

5. I have held my current position since 1999. In this role, I have primary responsibility on behalf of the District for administration and coordination of Alameda Countywide Program activities. My duties include preparing annual budgets and expenditure



1 reports, coordinating and submitting required program-wide reports to the Regional Water Quality  
2 Control Board (San Francisco Bay Region) (“Regional Board”), and advising the Consortium on  
3 compliance with federal and state laws, regulations, and orders.

4         6.       The Claimants are subject to the Municipal Regional Stormwater NPDES Permit,  
5 issued by the Regional Board, Order No. R2-2009-0074 (NPDES Permit No. CAS612008) (the  
6 “MRP”). I have reviewed the MRP and familiar with its requirements.

7         7.       I have also reviewed and am familiar with the requirements of Order No. R2-2003-  
8 0021 (NPDES Permit No. CAS0039831) issued by the Regional Board on February 19, 2003, as  
9 amended by Order No. R2-2007-00025, on March 14, 2007 (the “Prior Permit”), under which the  
10 Alameda Countywide Program member agencies were permittees.

11         8.       Based on my understanding of the Prior Permit and the MRP, I believe the MRP  
12 requires the Claimants to perform new activities that are unique to local governmental entities that  
13 were not required by the Prior Permit. These new activities are set forth in more detail in Exhibit  
14 E.

15         9.       I supervised a team of technical staff to compile the information set forth in Exhibit  
16 E. We reviewed the Prior Permit, references in Paragraph 7 of this Declaration, the MRP,  
17 references in Paragraph 6 of this Declaration, Test Claim 10-TC-02 and its accompanying  
18 declarations and exhibits, and the evidence and argument submitted by the Regional Board in  
19 support of its Response to Test Claim 10-TC-02.

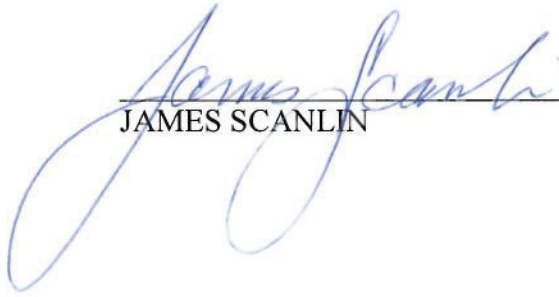
20         10.      The purpose of the table provided in Exhibit E of this Declaration is to allow the  
21 Commission on State Mandates Staff to review with ease the additional measures imposed on  
22 Claimants by the MRP, that the Regional Board incorrectly asserts are not new programs or higher  
23 levels of service.

24         11.      I have personally reviewed the table provided in Exhibit E of this Declaration, and I  
25 am satisfied that the information in the table is accurate and was compiled according to my  
26 instructions.

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

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Executed September 15, 2011, at Hayward, California.

  
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JAMES SCANLIN

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# **EXHIBIT E**

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

Paragraph	Permit Sub-provision	Summary and page # of Water Board’s Comment on Test Claim	Claimant’s Response	Cost notes
1.	C.8	RWB staff comments at p.28: <i>C.8 Claimants have argued that the Commission should compare the requirements in the Permit with those in the permits that were previously issued to each of them. That comparison does not include all applicable monitoring requirements to which the C.8 Claimants were subject. As discussed above Claimants were subject to mandatory requirements through their stormwater management plans, and annual workplans, and monitoring programs and plans. Those documents contained many requirements concerning monitoring, which although developed after their permits were adopted were nevertheless prospectively incorporated into their permits.</i>	The City of Alameda concurs with the Regional Board that the prior permits incorporated numerous requirements in “management plans, monitoring programs and annual reports.” However, the quantitative estimates provided in the Test Claim of levels of effort and associated costs under the prior permit were based upon actual work performed under the prior permit that was entirely consistent with these “management plans, monitoring programs and annual reports.” Thus all applicable monitoring requirements were included in the comparison between prior permits and MRP Provision C.8.	
2.	C.8.b	RWB staff comments at p.30: <i>... C.8 Claimants contend that Provision C.8.b requires a higher level of service in part because the Provision requires that Permittees participate in a monitoring program designed to answer specified questions about conditions in the San Francisco Estuary. The San Francisco Bay</i>	MRP Provision C.8.b requires the City of Alameda and other Permittees to participate in the San Francisco Estuary Regional Monitoring Program (“RMP”) or an equivalent measure. Permittees are required to participate in such a monitoring program by paying their “fair share” of monitoring costs. These requirements impose a higher level of service because the scope and budget of the RMP have generally increased from year to year and are projected to continue to increase. Cost estimates provided in Exhibit A to the 2010 Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will	Alameda Countywide Clean Water Program (“ACCWP”) staff attended at most 2-3 RMP working meetings per year during the prior permit term but now must actively participate in three workgroups (each having 1-2 all day meetings per year) and two strategy teams (each

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

	<p><i>Water Board disagrees that the Provision imposes a higher level of service with respect to the questions to be addressed through the required monitoring. C.8 Claimants have not provided any explanation about the monitoring that they believe is required under the Provision that was not required by their past permits. The Provision is intended to maintain the same level of monitoring that Permittees have been addressing through the monitoring they have conducted under their past permits.</i></p> <p><i>The RWB staff comment p. 31: The San Francisco Bay Water Board disagrees with the contention advanced by Alameda and the County of Santa Clara that the Provision requires that their respective countywide or regional stormwater programs devote additional resources to the RMP. Those claimants do not explain why they believe it will be necessary to provide additional staff time to working with the RMP. The Board infers that those claimants contend that additional resources will be required because they believe that Provision C.8.b requires additional monitoring in comparison with the monitoring they are currently performing</i></p>	<p>incur due to continued participation in the RMP (or equivalent).</p> <p>Furthermore, in the last 2 years the RMP has begun a Master Planning process which involves stronger Steering Committee direction on special studies and revising the ongoing Status and Trends program that is the subject of Provision C.8.b. As an example of greater coordination demands, over 10 subgroups and “strategy teams” have been added to the original RMP oversight structure of 4 workgroups and 2 committees. With limited staff resources stormwater, dischargers are not represented at all of these groups, and there is also an increase in the time required for RMP stakeholders’ representatives to review planning and strategy documents</p>	<p>having 2-4 meetings per year, in addition to the time required to review documents, participate in telephone conferences, etc.). A reasonable estimate of these costs was included in Exhibit A to the 2010 Declaration of James Scanlin.</p>
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<p><i>that was required by their prior permits. In fact the monitoring required by the Provision is intended to maintain the status quo of monitoring currently performed by Permittees under their prior permits. Thus, any increase in staff participation is voluntary on the part of Alameda and County of Santa Clara and is not a direct consequence of the requirements in provision C.8.b.</i></p>		
3.	C.8.c	<p>RWB staff comments at p.31: <i>Alameda, Brisbane and the County of Santa Clara argue that provision C.8.c greatly increases the number of monitoring sites and parameters from those included in their past permits. Additionally, Brisbane and the County of Santa Clara assert that the Provision expands the number of creek sites that must be monitored.</i></p> <p>RWB staff comments at p.33: <i>...Brisbane was subject to status monitoring requirements through the stormwater management plan and annual reports submitted on behalf of San Mateo County MS4 dischargers by SMCWPPP. San Mateo County Permittees were required to "assess urban runoff-related characteristics of representative watersheds in San Mateo County. Assessments will</i></p>	<p>Provision C.8.c of the MRP imposes on the City of Alameda and the other Alameda County Permittees increased levels of monitoring than was required under the prior permit. Specifically, C.8.c requires additional field samples and analysis, as well as increases to number of parameters for these field samples and analysis than was required for the monitoring conducted under the prior permits. Cost estimates provided in Exhibit A to the 2010 Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the monitoring specified in detail in Provision C.8.c. These estimates account for the increased costs for field crews and associated field equipment as well as the increase in analytical laboratory costs.</p> <p>Furthermore, the quantitative estimates of levels of effort and associated costs under the prior permit provided in the Test Claim were based upon actual work performed under the prior permit that was consistent with the previous management plans, monitoring programs and annual reports.</p> <p>Additionally, the scope of the ACCWP’s Multi-year Plan for Monitoring and Assessment was broader than the present Creek Status provision and included activities that are now part of C.8.e.</p>	<p>ACCWP’s minimum number of MRP sampling sites for creek status monitoring is set at 20 per year for bioassessment (Row 1 in Table 8.1 of the MRP). Other parameters can also be sampled at the same sites or a subset of those sites. The average number of bioassessment sampling sites under the prior permit was 14.</p> <p>Table 8.1 of the MRP requires ACCWP to sample according to 10 parameters. The following are the new parameters which require increases in effort:</p> <ul style="list-style-type: none"> <li>• Toxicity - Water Column, which requires a separate sampling event during a storm.</li> <li>• The MRP also adds a fourth test species to the</li> </ul>

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

	<p><i>typically focus on using environmental indicators...to characterize the functional attributes of creeks and potential for stormwater impacts...” SMCWPPP submitted annual workplans that indicated that Permittees would “perform chemical, biological and/or physical monitoring in selected San Mateo County watersheds.” The multi-year plan and workplans clearly indicate that Brisbane and other San Mateo County Permittees was already subject to status monitoring requirements under its prior permit. Provision C.8.c refined those requirements by adding more specificity to the prior permit status monitoring requirements and resulting multiyear plan and workplans, but it does not increase those requirements.</i></p> <p>Also, the RWB staff comment p. 32: <i>The ACCWP Multi-year Plan for Monitoring and Assessment detailed tasks for 2003-2008 that provided that Permittees were required to “[u]se a variety of indicators to assess the condition of streams and watersheds” and “[c]haracterize and track pollutants of concern that are found in urban runoff and have been identified as possible</i></p>	<p>The Multi-year Plan listed only the following specific approaches and indicators that ACCWP would use to assess stream and watershed condition:</p> <ul style="list-style-type: none"> <li>• Biological Indicators (p.II-20) would be “fish for larger perennial streams or where there are populations of special interest; BMI assemblages for streams with predominantly natural bottom substrate.”</li> <li>• Water Quality Screening (p. II-20) consisted of basic parameters of temperature, pH and dissolved oxygen, plus “turbidity, conductivity, ammonia and free and total chlorine. Grab samples will be collected for diazinon, hardness and total copper and zinc.”</li> </ul>	<p>U.S. EPA standard three-species tests, which increases the volume of water samples that must be collected, which increases costs for handling and transport to the toxicity laboratory.</p> <ul style="list-style-type: none"> <li>• Toxicity - Bedded Sediment is sampled in the same field visits as chemistry in bedded sediment. Estimated laboratory cost per sample for the analytes listed in footnote 34 of Table 8.1 are about \$100 per sample.</li> </ul> <p>The following parameters were part of ACCWP monitoring work plans in the previous permit, but now require increased effort due to changes in methodology:</p> <ul style="list-style-type: none"> <li>• General Water Quality now requires use of a continuous datalogger, for which 2 field visits are required for installation and deployment in addition to equipment maintenance and calibration between deployments.</li> <li>• The new method generates a continuous record of readings from</li> </ul>
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<p><i>sources of impairment".... The San Francisco Bay Water Board agrees that Provision C.8.c refined those requirements by adding more specificity to the prior permit status monitoring requirements and resulting ACCWP Monitoring Program Plan and Annual MYP updates, but it does not increase those requirements.</i></p>		<p>over 5,000 individual time intervals, requiring additional staff time to download the data and calculate interpretive statistics as well as performance of additional maintenance and calibration for the required Multi-parameter probe before and after each deployment</p> <ul style="list-style-type: none"> <li>• Bioassessment (the collection of aquatic organisms to evaluate community structure and stream condition) at most urban sites was previously limited to 2 main components: collection of a benthic macroinvertebrate sample and completion of a 2 page visual assessment for 10 physical habitat attributes. The MRP requires an expanded Surface Water Ambient Monitoring Program (SWAMP) protocol which adds collection and processing of 4 different types of algae samples, as well as quantitative measurements or scoring for over 20 different physical habitat</li> </ul>
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

				<p>parameters at a minimum of 10 transects within each site. These field measurements are recorded on a 26 page set of field forms. Using the old protocol, a 2-person team typically sampled 4 to 6 Alameda County sites per day, while the new MRP protocol requires at least 4 to 6 hours for a 3 to 4 person team to complete 1 site. Laboratory processing and analysis of the four algae samples is a new cost of approximately \$500 per site for the taxonomy (another \$100 for chlorophyll and ash-free dry mass), while macroinvertebrate lab costs alone were \$325 per site.</p> <ul style="list-style-type: none"><li>• Pollutants - Bedded Sediment were previously only sampled by ACCWP in special studies, not on an ongoing basis. The MRP requires 3 sites to be visited on 2 separate occasions each year in order to collect separate samples for pollutant analysis and for toxicity testing, neither of which was included in ACCWP</li></ul>
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

				<p>monitoring work plans under the previous permit. The cost of toxicity testing is approximately \$100 per sample while additional chemical analyses required by the MRP cost approximately \$1,500 per sample.</p> <ul style="list-style-type: none"> <li>• Stream Surveys were previously conducted by ACCWP for a maximum distance of 3.5 stream miles in one year, while the MRP requires nine stream miles.</li> <li>• Test Claimants are also required to conduct additional field visits separate from the bioassessment sampling conducted in spring.</li> </ul>
4.	C.8.d	<p>RWB staff comments at p.34: <i>Provision C.8.d.i details the monitoring that Permittees must conduct in the event long term monitoring results indicate that a Permittee's discharge exceeds a water objective, toxicity threshold, or other "trigger". Alameda, Brisbane and the County Clara contend that there are no comparable requirements in their prior permits. The San Francisco Bay Water Board disagrees that Provision C.8.d.i imposes a new program or level of service. In fact Provision</i></p>	<p>The requirements of MRP Provision C.8.d are new to the City of Alameda and other Alameda County Permittees. Specifically, Provision C.8.d requires design and implementation of more field studies and associated sampling and analysis than the monitoring conducted under the prior permits. Cost estimates provided in Exhibit A to the Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the monitoring specified in detail in Provision C.8.d. These estimates account for increased costs for required project design, fieldwork, sampling and laboratory analysis, interpretation and reporting.</p> <p>Additionally, the quantitative estimates provided in the Test Claim present the new levels of effort and associated costs than were required under the prior permit, and are based upon actual</p>	<p>Under the prior permit, the ACCWP was only required to perform three to four investigation projects, whereas the MRP now allows the ACCWP to conduct up to 5 investigation projects.</p>

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<p><i>C.8.d.i sets forth more detail about the requirements which the C.8.d Claimants were already required to follow in Provision C.1 of their prior permits.</i></p> <p>RWB staff comments on p.35: <i>Provision C.8.d.ii requires that Permittees investigate the effectiveness of one best management practice (BMP) for stormwater treatment or hydrograph modification control. ...Alameda, Brisbane and the County of Santa Clara argue that Provision C.8.d.ii imposes a new program or higher level of service. In fact it is consistent with their previous permits. Each of the C.8 Claimants was previously required to conduct monitoring designed in part to achieve "evaluation of effectiveness of representative stormwater pollution prevention or control measures."</i></p> <p><i>Provision C.8.d.iii requires that Permittees monitor a waterbody within each county to determine "how and where creeks can be restored or protected to cost-effectively reduce the impacts of pollutants, increased flow rates, and increased flow durations of urban runoff..." C.8 Claimants' prior permits did not include a</i></p>	<p>work performed under the prior permit that was entirely consistent with the management plans, monitoring programs and annual reports associated with the prior permits.</p> <p>Furthermore, the monitoring triggers imposed by the MRP do not necessarily pertain to the permittee’s discharge, but rather relate to monitoring of receiving water conditions.</p> <p>In addition, MRP provision C.8.d.i(1) requires permittees to use elaborate EPA evaluation procedures, which were not required under the prior permit and result in the cost of each investigation project to increased.</p> <p>Moreover, the BMP effectiveness requirement in the previous permits was met through the existing stormwater program and receiving water monitoring programs, which were sufficient to help evaluate the overall effectiveness of the various types of BMPs implemented through municipal stormwater programs, whereas the MRP requires additional measures to be implemented.</p> <p>While the Hydromodification Management Plan prepared by Alameda County Claimants during the prior permit contained citations to geomorphic studies performed by others, this plan noted that such studies were optional strategies for confirming the effectiveness of specific types of hydromodification management controls, and did not require these strategies to be implemented.</p> <p>Lastly, the permit amendments incorporating hydromodification management measures applied to Provision C.3 addressing new development and redevelopment projects, and did not pertain to monitoring.</p>	
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<p><i>monitoring requirement expressly described as a "Geomorphic Project" monitoring requirement. Instead their prior permits were amended to include related requirements to develop and implement hydromodification management plans and to monitor the effectiveness of hydromodification control measures. Provision C.8.d.iii provides added specificity to those requirements but does not result in a new program or higher level of service.</i></p>		
5.	C.8.e.i, C.8.e.ii, and C.8.e.vi	<p>RWB staff comments at p.36: <i>Provision C.8.e.i requires that Permittees monitor for pollutants of concern at locations specified in the Permit. It provides in the alternative that upon approval by the San Francisco Bay Regional Board's Executive Officer, Permittees may use alternate monitoring locations. As stated in C.8.e.i, the purpose of pollutants of concern monitoring is to meet four priority management information needs: 1) identifying which Bay tributaries (including stormwater conveyances) contribute most to Bay impairment from pollutants of concern; 2) quantifying annual loads or concentrations of pollutants of concern from tributaries to the Bay; 3)</i></p>	<p>The requirements of MRP Provisions C.8.e.i, C.8.e.ii, and C.8.e.vi are new to the City of Alameda and other Alameda County Permittees. Specifically, Provision C.8.e.i, C.8.e.ii, and C.8.e.vi require design and implementation of more field studies and associated sampling and analysis than the monitoring conducted under the prior permits. Cost estimates provided in Exhibit A to the 2010 Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the monitoring specified in detail in Provisions C.8.e.i, C.8.e.ii, and C.8.e.vi. These estimates account for increased costs for required project design, field work, sampling and laboratory analysis, interpretation and reporting.</p> <p>Additionally, the quantitative estimates provided in the Test Claim present the new levels of effort and associated costs than were required under the prior permit, and are based upon actual work performed under the prior permit that was entirely consistent with the management plans, monitoring programs and annual reports associated with the prior permits.</p> <p>Furthermore, it should be noted that Provision C8.e.i of the MRP allows phased implementation with at least half of the</p>	<p>Additional set up costs per site include the following:  The prior ACCWP monitoring used one "ISCO"-type autosampler at a station initially installed in 1988. Sampling the required Category one and Category two parameters in MRP Table 8.4 would require a minimum of 4 autosamplers per station at 8 per unit sampling purchase cost of \$3,200. Accessory tubing, cables, batteries and sample bottles will increase the effective unit cost to over \$5000 per sampler. Stations with multiple samplers also require larger security enclosures and solar panels, with higher ongoing maintenance costs.</p>

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

	<p><i>quantifying the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and 4) quantifying the projected impacts of management actions (including control measures) on tributaries and identifying where these management actions should be implemented to have the greatest beneficial impact. Santa Clara County and Brisbane assert that the provision establishes a new program because their prior permits did not include a comparable provision.</i></p> <p><i>C.8.e.i is not a new program or higher level of service. C.8 Claimants' prior permits required monitoring for pollutants of concern. Those permits required that Alameda, Brisbane and Santa Clara County implement monitoring programs that would characterize "representative drainage areas and stormwater discharges, including land use characteristics pollutant concentrations and mass loadings", assess "existing or potential averse impacts on beneficial uses caused by pollutants of concern in stormwater dischargers, including an evaluation of representative receiving waters",</i></p>	<p>total stations monitored in the water year beginning October 2010, and all the stations monitored in the water year beginning October 2012. As a result, the costs calculated for FY 2011 include some setup of the program, but not the operational cost of running the second Alameda County station required by the MRP.</p> <p>Furthermore, the prior permit only required the City of Alameda and the other Alameda County Permittees to implement a monitoring plan, which Test Claimants developed and the Regional Board approved. These prior approved monitoring plans will no longer suffice, which will result in additional costs than required under the previous monitoring efforts.</p> <p>Lastly, the prior permits did not require any form of long-term monitoring as does the MRP.</p>	<p>Estimated Laboratory cost for the MRP Category 1 parameter list are \$13,000 per site for the required minimum 4 sampling events per year. In alternative years Category 2 parameters would be an additional \$4000. Analysis for many Category 2 parameters is costly and provided by very few commercial laboratories. For example, accurate methods for measuring the pesticide fipronil have only been published in the last 5-10 years and there is no commercial market incentive for laboratories to offer this service at low cost. In contrast to previous ACCWP samples which could be shipped to a single laboratory, it is likely that several different labs will need to be employed in order to provide SWAMP comparable to results as required by the MRP.</p> <p>The City of Alameda and the other Alameda County Permittees will also be required to add 1 additional monitoring station (Zone 4 Line A at Chabot Road in Hayward, MRP provision C.8.e.i(3)) in order to comply</p>
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board's Comments

	<p><i>and evaluate "effectiveness of representative stormwater pollution prevention or control measures.</i></p> <p><i>Provision C.8.e.ii requires that Permittees conduct Long-Term monitoring at stations listed in the Permit. The Permit authorizes Permittees to conduct monitoring at alternate locations upon approval by the San Francisco Bay Water Board's Executive Officer. Provision 8.e states that Long-Term monitoring is "intended to assess long-term trends in pollutant concentrations and toxicity in receiving waters and sediment, in order to evaluate if stormwater discharges are causing or contributing to toxic impacts on aquatic life."</i></p> <p><i>RWB staff comments at p.37: Alameda, Brisbane and the County of Santa Clara contend that provision C.8.e.ii is a new program and state that their prior permits did not include a provision that required monitoring to detect long term trends. In fact C.8 Claimants' prior permits required monitoring of long term trends.</i></p> <p><i>Provision C.8.e.vi requires that Permittees develop a design for a sediment delivery</i></p>		<p>with the MRP.</p>
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<p><i>estimate/sediment budget in local tributaries and urban drainages. Permittees are required to implement the study by July 1,2011. Alameda, Brisbane and the County of Santa Clara argue that Provision C.8.e.vi is a new program in that their prior permits did not require them to design or implement sediment deliver studies. The San Francisco Bay Water Board agrees that the C.8 Claimants' prior permits did not require them to design or implement sediment delivery studies. The Provision added further specificity to the monitoring requirements included in C.8 Claimants' prior permits.</i></p> <p>RWB staff comment p. 36:  <i>Alameda contends that the provision substantially increases the monitoring beyond that which was required in its former permit.</i></p>		
6.	C.8.f	<p>RWB staff comments at p.38:  <i>Alameda, Brisbane and Santa Clara County assert that the Provision imposes a new program in that their prior permits did not include similar provisions. Alameda and Brisbane were both subject to similar requirements through the plans prepared to implement</i></p>	<p>MRP Provision C.8.f requires the City of Alameda and other Alameda County Permittees to encourage citizen monitoring. Specifically, Provision C.8.f requires new efforts that were not conducted under the prior permit, which include the permittees to make reasonable efforts to seek out citizen and stakeholder information and comment regarding <u>water body function and quality</u> and permittees must also annually demonstrate encouragement of citizen and stakeholder observations and reporting of <u>water body conditions</u>.</p>	

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<p><i>their prior permits.</i></p> <p>RWB staff comments at p.39:  <i>...Brisbane and other San Mateo County Permittees were required to encourage citizen monitoring through their countywide stormwater program's stormwater management plan. The plan provides that the Permittees shall "develop and implement Integrated Outreach Approaches" and that they shall "identify and support a "Friends of a (a watershed)" group and encourage creek (lagoon or shoreline) cleanups, or adopt-a-creek or other volunteer monitoring and resource inventorying activities." Brisbane's prior permit clearly required it to conduct citizen outreach requirements that were equivalent to those required by the Provision c.8.f.</i></p>	<p>Cost estimates provided in Exhibit A to the 2010 Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will incur due to the increased level of effort required to implement the activities specified in Provision C.8.f. There are no specific increases in number of monitoring sites or parameters associated with this provision, but the level of coordination required (i.e., program staff time) is greater than the level under the prior permit.</p>	
7.	C.8.g	<p>RWB staff comments at p.39:  <i>C.8 Claimants contend that Provision C.8.g will result in increased reporting efforts because there are an increased number of data parameters and programs in comparison with their prior permits. They do not identify the requirements that they believe have increased thus it is not possible to reply with specificity. The San Francisco Bay Water Board infers that C.8 Claimants are claiming that</i></p>	<p>Provision C.8.g includes various requirements concerning reporting of monitoring results. It provides that Permittees must take specified actions in the event that stormwater runoff or dry weather discharges are or may be causing or contributing to exceedances of applicable water quality standards. It further requires that Permittees must submit the following annual reports: Electronic Status Monitoring Data Report, Urban Creek Monitoring Report, and Integrated Monitoring Report. Provision C.8.g imposes on the City of Alameda and other Alameda County Permittees increased levels of reporting relative to the prior permit and thus a higher level of service. Specifically, C.8.g requires electronic reporting and requires that the data be maintained in a database accessible by the public. In addition, the requirement for submission of a separate annual Urban</p>	



Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		<i>their reporting requirements concerning urban creeks monitoring have increased due to some of the other monitoring provisions they challenge. Any increase in reporting burden associated with these other monitoring provisions is minimal. The requirement at issue adds further specificity to the requirements applicable to Permittees as required under federal law.</i>	Creeks Monitoring Report is new. This submission prescribes roughly similar report contents, but due to the increased number of data parameters and programs under C.8.c, C.8.d, and C.8.e, the total level of reporting effort will increase relative to the prior permit. Cost estimates provided in Exhibit A to the 2010 Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will incur due to increased reporting level of effort.	
8.	C.8.h	<p>RWB staff comments at p.40: <i>Provision C.8.h provides that where applicable monitoring data must be "SWAMP comparable". SWAMP is the State Water Board's Surface Water Ambient Monitoring Program (SWAMP) which was created to assess the conditions of surface waters throughout California and coordinate all water quality monitoring conducted by the State and Regional Water Boards. The Provision requires that "minimum data quality shall be consistent with the latest version of the SWAMP Quality Assurance Project Plan (QAPP)." This statement is a clarification of what must be done to ensure that monitoring data are "SWAMP comparable".</i></p> <p>RWB staff comments at p.41: <i>Claimants Alameda, Brisbane</i></p>	<p>Provision C.8.h requires that monitoring data be SWAMP comparable. Accordingly, minimum data quality shall be consistent with the latest version of the SWAMP Quality Assurance Project Plan (QAPP) for applicable parameters, including data quality objectives, field and laboratory blanks, field duplicates, laboratory spikes, and clean techniques, using the most recent standard operating procedures.</p> <p>The prior permit makes no mention of the SWAMP program. Provision C.8.h of the MRP requires the City of Alameda and the other Alameda County Permittees to develop significant updates or additions to existing field standard operating procedures, which will require field staff to be trained in order to collect monitoring data that is to be collected "SWAMP comparable" using methods defined by SWAMP. Additionally, as the MRP requires data to be reported electronically to the Regional Water Board in "SWAMP comparable" formats, new data management systems must be developed and managed at significant costs. Monitoring data quality assurance procedures (also SWAMP comparable) will also have to be developed, documented and adhered to by the ACCWP at all times, which requires an additional level of effort (staff time) compared to previous quality assurance procedures conducted by the ACCWP under the prior permit. Cost estimates provided in Exhibit A to the 2010 Declaration of James Scanlin represent the projected <u>increase in costs</u> that the Permittees will incur due</p>	<p>Regarding requirements for data submittals that must now be "SWAMP comparable," the Water Board sent a letter to program managers of ACCWP and other countywide programs, stating that the Electronic Data submittal required in C.8.g should be accompanied by submittal of the data directly to the regional designated agency for uploading to the state's CEDEN database, which will result in increased costs.</p>

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	<p><i>and County of San Mateo argue that Provision C.8.h imposes a higher level of service. They note that their prior permits did not mention the SWAMP program. C.8 Claimants assert that the provision requires that they develop significant updates or additions to existing field standard operating procedures and train field staff regarding collection of data using methods that are compatible with the SWAMP program. They further contend that new data management systems must be developed and managed. C.8 Claimants argue that monitoring data quality assurance procedures will have to be developed, documented and then they will have to adhere to them.</i></p> <p><i>The San Francisco Bay Water Board agrees that the C.8 Claimants' prior permits did not expressly require that monitoring data had to be SWAMP comparable. Nevertheless...the prior permits had requirements to assure the quality of monitoring data used to assess conditions in surface water, and the new Permit requirement that where applicable monitoring data must be "SWAMP comparable" is equivalent to the prior permits' quality assurance requirements.</i></p>	<p>to increased level of effort required by C.8.h. The quality assurance requirements under the previous permits were not equivalent to those under the MRP Provision C.8.h. Rather, a higher level of effort related to quality assurance is required under C.8.h.</p>	
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Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

9.	C.10	RWB staff comments at p.48/¶ 6 state that the SFBWQCB agrees that Provision C.10 requires a higher level of service.	Alameda County Claimants agree.	
10.	C.10.a.i	RWB staff comments at p.49/¶2 that this provision is not a new program or higher level of services because Claimants were required to perform street sweeping, inlet cleaning, storm drain maintenance.	The MRP requires the City of Alameda and the other Alameda County Permittees to develop a baseline trash load estimate, and then reduce this baseline by 40%. Exhibit B to the 2010 Declaration of James Scanlin excluded baseline activities from the estimates cost increase. Accordingly, the City of Alameda and the other Alameda County Permittees will have to develop new measures in order to comply with the 40% reduction from baseline.  The prior permit did not require a baseline trash load estimate to be development or reduced.	See below.
11.	C.10.a.i	RWB staff comments at p.49/¶3 that Alameda was required to perform street sweeping, inlet cleaning, storm drain maintenance, and develop a storm water drainage maintenance plan, and argues that these actions are similar to what will be required in short-term trash plan.	The MRP requires the City of Alameda and the other Alameda County Permittees to develop a baseline trash load estimate, and then reduce this baseline by 40%. Exhibit B to the 2010 Declaration of James Scanlin excluded baseline activities from the estimates cost increase. Accordingly, the City of Alameda and the other Alameda County Permittees will have to develop new measures in order to comply with the 40% reduction from baseline.  The prior permit did not require a baseline trash load estimate to be development or reduced.	The following options are currently being evaluated by the City of Alameda and the other Alameda County Permittees in order to comply with the 40% baseline reduction. Options include increases in street sweeping or creek cleanups, the installation of additional full trash capture devices, plastic bag and polystyrene bans, public outreach, enhanced trash container management, enhanced litter enforcement, as well as other actions.
12.	C.10.a.i	RWB staff comments at p.49/¶3 that Alameda was required to develop monthly records concerning the area targeted for litter removal.	The provisions of the MRP and the prior permits are not similar. The MRP requires a higher level of effort in order to reduce the baseline by 40% than was required to develop monthly records concerning the areas targeted for litter removal.	
13.	C.10.a.ii	RWB staff comments at p.49/¶3 that Alameda was required to develop monthly records	The previous permit only required the City of Alameda and the other Alameda County Permittees to collect information on the amount of litter removed from the target areas, and not to collect	The City of Alameda and the other Alameda County Permittees are currently

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

		concerning the area targeted for litter removal and the total amount of litter removed.	information on the amount of litter that was discharged. Additionally, the City of Alameda and the other Alameda County Permittees must also document the trash removed through existing practices, and also track trash removed through the additional control measures or increased implementation required to comply with the 40% reduction.	developing the baseline trash load estimate. The City of Alameda and the other Alameda County Permittees have committed approximately \$50,000 to the regional effort to develop the trash load estimate. The City of Alameda and the other Alameda County Permittees have also committed an additional \$25,000 to a pilot project within Alameda County to gather data to assist with the regional effort. Each population-based permittee will need to take the results of the regional baseline estimate and use the information to develop the estimate for their jurisdiction. This will require significant staff time and GIS resources.
14.	C.10.a.ii	RWB staff comments at p.51/[2 that C.10.a.ii requires more specificity	Alameda County Claimants agree.	
15.	C.10.a.iii	RWB staff comments at p.51/[5 that MRP Provision C.10.a.iii does not require higher level of service.	The MRP requires installation and maintenance of full trash capture devices. The prior permit did not require any full trash capture devices to be installed or maintained. Although Santa Clara County installed full trash capture devices as part of a pilot program, the City of Alameda and the other Alameda County Permittees were never required to implement similar measures.	The following example is helpful to address the measures that will need to be taken to install and maintain full trash capture devices: The City of San Leandro recently installed 250 drop inlet full trash capture devices. Each of these devices will need to be clean at least annually and many

Exhibit E to the 2011 Declaration of James Scanlin – Alameda County Claimants Responses to the San Francisco Bay Water Board’s Comments

				will need to be cleaned several times per year. The prior permit required the City of San Leandro to inspect and clean the drop inlets as necessary. The efforts implemented to clean were minimal as the drop inlets are designed to be flushed clean by stormwater and not retain material. The full trash capture filters in each inlet will need to be cleaned much more often, which will often entail a 2 person team and a vactor truck. The filter screen will usually need to be taken out and brushed clean, which will result in increased labor and equipment costs than were previously required.
16.	C.10.b.i and ii	RWB staff comments at p.51/Sect. 4/¶3 that the prior permits required <u>cleanup</u> and assessment of stream locations under prior permit.	The ACCWP conducted 3 pilot trash assessments on behalf of Alameda and other members under the prior permit, but cleanups were not part of the assessment method at that time as they are now required under the MRP.	
17.	C.10.b.i and ii	RWB staff comments at p.51/Sect. 4/¶4 that the Alameda County Claimants were required to <u>cleanup</u> and perform assessment of stream locations under prior permit. The trash assessment method described in the plan requires complete clean up of stream reach.	The ACCWP conducted 3 pilot trash assessments annually on behalf of Alameda and other members, but cleanups were not part of the assessment method at that time as they are now required under the MRP. Furthermore, these 3 assessments were conducted on behalf of all member agencies, whereas the MRP now requires hot spot <u>cleanups</u> and assessments at 55 sites throughout the County of Alameda. This results in a substantial increase in costs and efforts.	
18.	C.10.b.i and ii	RWB staff comments at p.52/¶2 that because the Claimants were conducting required trash hot spot cleanups under previous	The ACCWP, on behalf of the City of Alameda and the other Alameda County Permittees, was not required to conduct cleanups and only had to assess 3 sites once during the prior permit term. MRP requires assessment and cleanups of 55 sites	

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		permit, MRP Provisions C.10.b.i and ii are not new programs or higher levels of service.	annually. This results in a substantial increase in efforts and costs.	
19.	C.10.b.iii	RWB staff comments at p.52/Sect. 5/¶¶2, 3, 4, and 5 that because Claimants were conducting required trash hot spot cleanups under previous permit, MRP Provision C.10.b.iii is not a new program or higher level of service.	The ACCWP, on behalf of the City of Alameda and the other Alameda County Permittees, was not required to conduct cleanups and only had to assess 3 sites once during the prior permit term. MRP requires assessment and cleanups of 55 sites annually. This results in a substantial increase in efforts and costs.	
20.	C.10.c	RWB staff comments at p.53/¶1 that Claimants conducted planning efforts for short-term trash reduction.	The prior permit and workplans did not require a short term trash reduction plan to be developed.  Furthermore, the City of Alameda and Alameda County Permittees were only required to plan trash assessment and source characterization activities, and not new or enhanced control measures. Accordingly, the City of Alameda and the other Alameda County Permittees will be required to expend additional funds in order to comply with the MRP.	
21.	C.11.f and C.12.f	RWB staff comments at p.55/Sect. 3.B/¶1 that prior permits required the Claimants to develop and implement control programs for mercury and PCBs (dry water flows).	The prior workplans assessed actions to reduce PCBs and mercury, but did not include the optional diversion to POTWs as does the MRP. Diversion to a POTW will require substantial funds to be expended.  Furthermore, many portions of the MS4 in Alameda County have flows during dry weather that do not, in fact, result from prohibited non-stormwater discharges.	

1714599.3

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# Exhibit 1



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\*\*\* CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 22. SEA GRANT COLLEGES AND MARINE SCIENCE DEVELOPMENT  
NATIONAL SEA GRANT COLLEGE PROGRAM

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*33 USCS § 1131*

§ 1131. Authorization of appropriations

(a) Authorization.

(1) In general, There are authorized to be appropriated to the Secretary to carry out this *title [33 USCS §§ 1121 et seq.]*--

- (A) \$ 72,000,000 for fiscal year 2009;
- (B) \$ 75,600,000 for fiscal year 2010;
- (C) \$ 79,380,000 for fiscal year 2011;
- (D) \$ 83,350,000 for fiscal year 2012;
- (E) \$ 87,520,000 for fiscal year 2013; and
- (F) \$ 91,900,000 for fiscal year 2014.

(2) Priority activities. In addition to the amounts authorized under paragraph (1), there are authorized to be appropriated for each of fiscal years 2009 through 2014--

- (A) \$ 5,000,000 for competitive grants for university research on the biology, prevention, and control of aquatic nonnative species;
- (B) \$ 5,000,000 for competitive grants for university research on oyster diseases, oyster restoration, and oyster-related human health risks;
- (C) \$ 5,000,000 for competitive grants for university research on the biology, prevention, and forecasting of harmful algal blooms; and
- (D) \$ 3,000,000 for competitive grants for fishery extension activities conducted by sea grant colleges or sea grant institutes to enhance, and not supplant, existing core program funding.

(b) Limitations.

(1) Administration. There may not be used for administration of programs under this *title [33 USCS §§ 1121 et seq.]* in a fiscal year more than 5 percent of the lesser of--

- (A) the amount authorized to be appropriated under this *title [33 USCS §§ 1121 et seq.]* for the fiscal year; or
- (B) the amount appropriated under this *title [33 USCS §§ 1121 et seq.]* for the fiscal year.

(2) Use for other offices or programs. Sums appropriated under the authority of subsection (a)(2) shall not be available for administration of this *title [33 USCS §§ 1121 et seq.]* by the National Sea Grant Office, for any other Administration or department program, or for any other administrative expenses.

(c) Distribution of funds. In any fiscal year in which the appropriations made under subsection (a)(1) exceed the amounts appropriated for fiscal year 2003 for the purposes described in such subsection, the Secretary shall distribute

any excess amounts (except amounts used for the administration of the sea grant program) to any combination of the following:

- (1) sea grant programs, according to their performance assessments;
- (2) regional or national strategic investments authorized under section 204(b)(4) [33 USCS § 1123(b)(4)];
- (3) a college, university, institution, association, or alliance for activities that are necessary for it to be designated as a sea grant college or sea grant institute; and
- (4) a sea grant college or sea grant institute designated after the date of enactment of the National Sea Grant College Program Act Amendments of 2002 [enacted Nov. 26, 2002] but not yet evaluated under section 204(d)(3)(A) [33 USCS § 1123(d)(3)(A)].

(d) Availability of sums. Sums appropriated pursuant to this section shall remain available until expended.

(e) Reversion of unobligated amounts. The amount of any grant, or portion of a grant, made to a person under any section of this Act that is not obligated by that person during the first fiscal year for which it was authorized to be obligated or during the next fiscal year thereafter shall revert to the Secretary. The Secretary shall add that reverted amount to the funds available for grants under the section for which the reverted amount was originally made available.

#### **HISTORY:**

(June 17, 1966, P.L. 89-454, Title II, § 212, as added Oct. 8, 1976, P.L. 94-461, § 2, 90 Stat. 1968; June 29, 1977, P.L. 95-58, § 1, 91 Stat. 254; Oct. 7, 1978, P.L. 95-428, § 3(5), 92 Stat. 1000; June 28, 1980, P.L. 96-289, § 1(6), 94 Stat. 605; Nov. 8, 1984, P.L. 98-623, Title V, § 501(a), 98 Stat. 3410; Dec. 29, 1987, P.L. 100-220, Title III, Subtitle A, § 3110, 101 Stat. 1474; Dec. 4, 1991, P.L. 102-186, § 3, 105 Stat. 1282; March 6, 1998, P.L. 105-160, § 9(a), (b), 112 Stat. 26; Nov. 26, 2002, P.L. 107-299, § 7, 116 Stat. 2347; Oct. 13, 2008, P.L. 110-394, § 10, 122 Stat. 4209.)

#### **HISTORY; ANCILLARY LAWS AND DIRECTIVES**

#### References in text:

As used in this section, "this Act" is probably a reference to the National Sea Grant College Program Act (Title II of Act June 17, 1966, P.L. 89-454), which appears as 33 USCS §§ 1121 et seq.

#### Amendments:

1977. Act June 29, 1977 substituted "each of the fiscal years ending September 30, 1977, and September 30, 1978" for "the fiscal year ending September 30, 1977".

1978. Act Oct. 7, 1978 substituted the introductory matter and paras. (1) and (2) for "There is authorized to be appropriated for purposes of carrying out the provisions of this title (other than section 206) not to exceed \$ 50,000,000 for each of the fiscal years ending September 30, 1977, and September 30, 1978".

1980. Act June 28, 1980 added para. (3).

1984. Act Nov. 8, 1984 added para. (4).

1987. Act Dec. 29, 1987 substituted the text of this section for text which read:

"There are authorized to be appropriated for purposes of carrying out the provisions of this title (other than section 206 not to exceed the following amounts:

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- "(1) \$ 50,000,000 for each of fiscal years 1977 and 1978.
  - "(2) \$ 55,000,000 for each of fiscal years 1979 and 1980.
  - "(3) Not to exceed \$ 50,000,000 for fiscal year 1981, not to exceed \$ 58,000,000 for fiscal year 1982, and not to exceed \$ 65,000,000 for fiscal year 1983.
  - "(4) Not to exceed \$ 39,000,000 for fiscal year 1985, not to exceed \$ 42,000,000 for fiscal year 1986, and not to exceed \$ 44,000,000 for fiscal year 1987.
- Such sums as may be appropriated under this section shall remain available until expended."

1991. Act Dec. 4, 1991 substituted subsecs. (a)-(c) for ones which read:

- "(a) In general. There is authorized to be appropriated to carry out the provisions of this Act other than sections 206 and 211, an amount--
  - "(1) for fiscal year 1988, not to exceed \$ 41,500,000;
  - "(2) for fiscal year 1989, not to exceed \$ 50,500,000; and
  - "(3) for fiscal year 1990, not to exceed \$ 51,000,000.
- "(b) Strategic marine research. There is authorized to be appropriated to carry out section 206 and section 208(c), an amount--
  - "(1) for fiscal year 1988, not to exceed \$ 500,000;
  - "(2) for fiscal year 1989, not to exceed \$ 5,000,000; and
  - "(3) for fiscal year 1990, not to exceed \$ 10,000,000.
- "(c) Marine affairs and resource management grants. There is authorized to be appropriated to carry out section 211, an amount--
  - "(1) for fiscal year 1988, not to exceed \$ 2,000,000;
  - "(2) for fiscal year 1989, not to exceed \$ 2,500,000; and
  - "(3) for fiscal year 1990, not to exceed \$ 3,000,000."

1998. Act March 6, 1998, substituted subsecs. (a) and (b)(1) for ones which read:

- "(a) There is authorized to be appropriated to carry out the provisions of sections 205 and 208 of this Act, and section 3 of the Sea Grant Program Improvement Act of 1976 (33 U.S.C. 1124a), an amount--
  - "(1) for fiscal year 1991, not to exceed \$ 44,398,000;
  - "(2) for fiscal year 1992, not to exceed \$ 46,014,000;
  - "(3) for fiscal year 1993, not to exceed \$ 47,695,000;
  - "(4) for fiscal year 1994, not to exceed \$ 49,443,000; and
  - "(5) for fiscal year 1995, not to exceed \$ 51,261,000.
- "(b)
  - (1) There is authorized to be appropriated for administration of this Act, including section 209, by the National Sea Grant Office and the Administration, an amount--
    - "(A) for fiscal year 1991, not to exceed \$ 2,500,000;
    - "(B) for fiscal year 1992, not to exceed \$ 2,600,000;
    - "(C) for fiscal year 1993, not to exceed \$ 2,700,000;
    - "(D) for fiscal year 1994, not to exceed \$ 2,800,000; and
    - "(E) for fiscal year 1995, not to exceed \$ 2,900,000."

2002. Act Nov. 26, 2002, substituted subsecs. (a)-(c) for ones which read:

- "(a) Authorization.
  - (1) In general. There is authorized to be appropriated to carry out this Act--
    - "(A) \$ 56,000,000 for fiscal year 1999;
    - "(B) \$ 57,000,000 for fiscal year 2000;
    - "(C) \$ 58,000,000 for fiscal year 2001;
    - "(D) \$ 59,000,000 for fiscal year 2002; and
    - "(E) \$ 60,000,000 for fiscal year 2003.
  - "(2) Zebra mussel and oyster research. In addition to the amount authorized for each fiscal year under paragraph (1)-

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"(A) up to \$ 2,800,000 may be made available as provided in section 1301(b)(4)(A) of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (*16 U.S.C. 4741(b)(4)(A)*) for competitive grants for university research on the zebra mussel;

"(B) up to \$ 3,000,000 may be made available for competitive grants for university research on oyster diseases and oyster-related human health risks; and

"(C) up to \$ 3,000,000 may be made available for competitive grants for university research on *Pfiesteria piscicida* and other harmful algal blooms.

"(b) Program elements.

(1) Limitation. No more than 5 percent of the lesser of--

"(A) the amount authorized to be appropriated; or

"(B) the amount appropriated,

for each fiscal year under subsection (a) may be used to fund the program element contained in section 204(b)(2).

"(2) Sums appropriated under the authority of subsections (a) and (c) shall not be available for administration of this Act by the National Sea Grant Office, or for Administration program or administrative expenses.

"(c) Priority oyster disease research. In addition to sums authorized under subsection (a), there is authorized to be appropriated for priority oyster disease research under section 205 of this Act, an amount--

"(1) for fiscal year 1992, not to exceed \$ 1,400,000;

"(2) for fiscal year 1993, not to exceed \$ 3,000,000;

"(3) for fiscal year 1994, not to exceed \$ 3,000,000; and

"(4) for fiscal year 1995, not to exceed \$ 3,000,000."

2008. Act Oct. 13, 2008, in subsec. (a), substituted para. (1) for one which read:

"(1) In general. There are authorized to be appropriated to the Secretary to carry out this title--

"(A) \$ 60,000,000 for fiscal year 2003;

"(B) \$ 75,000,000 for fiscal year 2004;

"(C) \$ 77,500,000 for fiscal year 2005;

"(D) \$ 80,000,000 for fiscal year 2006;

"(E) \$ 82,500,000 for fiscal year 2007; and

"(F) \$ 85,000,000 for fiscal year 2008."

and in para. (2), in the introductory matter, substituted "fiscal years 2009 through 2014--" for "fiscal years 2003 through 2008--", in subpara. (A), substituted "biology, prevention, and control of aquatic" for "biology and control of zebra mussels and other important aquatic", and in subpara. (C), substituted "blooms; and" for "blooms, including *Pfiesteria piscicida*; and"; and in subsec. (c), in para. (1), substituted "performance assessments" for "rating under section 204(d)(3)(A)", and substituted para. (2) for one which read: "(2) national strategic investments authorized under section 204(b)(4);".

Other provisions:

**Notice of reprogramming.** Act March 6, 1998, P.L. 105-160, § 9(c), 112 Stat. 26, provides: "If any funds authorized by this section are subject to a reprogramming action that requires notice to be provided to the Appropriations Committees of the House of Representatives and the Senate, notice of such action shall concurrently be provided to the Committees on Science and Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate."

**NOTES:**

Related Statutes & Rules:

This section is referred to in *33 USCS §§ 1124, 1127*.

# Exhibit 2



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\*\*\* CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
RESEARCH AND RELATED PROGRAMS

**Go to the United States Code Service Archive Directory**

*33 USCS § 1251*

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.]--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act [33 USCS §§ 1251 et seq.]. It is the policy of Congress that the States manage the construction grant program under this Act [33 USCS §§ 1251 et seq.] and implement the permit programs under sections 402 and 404 of this Act [33 USCS §§ 1342, 1344]. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries. It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines

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appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer *33 USCS §§ 1251 et seq.* Except as otherwise expressly provided in this Act [*33 USCS §§ 1251 et seq.*], the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act [*33 USCS §§ 1251 et seq.*].

(e) Public participation in development, revision, and enforcement of any regulation, etc. Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act [*33 USCS §§ 1251 et seq.*] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing *33 USCS §§ 1251 et seq.* It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act [*33 USCS §§ 1251 et seq.*] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act [*33 USCS §§ 1251 et seq.*]. It is the further policy of Congress that nothing in this Act [*33 USCS §§ 1251 et seq.*] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

**HISTORY:**

(June 30, 1948, ch 758, Title I, § 101, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 816; Dec. 27, 1977, P.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575; Feb. 4, 1987, P.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**Explanatory notes:**

The Federal Water Pollution Control Act, contained in this chapter, was originally enacted by Act June 30, 1948, ch 758, 62 Stat. 1155, and amended by Acts July 17, 1952, ch 927, 66 Stat. 755; July 9, 1956, ch 518, 70 Stat. 498; June 25, 1959, P.L. 86-70, 73 Stat. 141; July 12, 1960, P.L. 86-624, 74 Stat. 411; July 20, 1961, P.L. 87-88, 75 Stat. 204; Oct. 2, 1965, P.L. 89-234, 79 Stat. 903; Nov. 3, 1966, P.L. 89-753, 80 Stat. 1246; April 3, 1970, P.L. 91-224, 84 Stat. 91; Dec. 31, 1970, P.L. 91-611, 84 Stat. 1818; July 9, 1971, P.L. 92-50, 85 Stat. 124; Oct. 13, 1971, P.L. 92-137, 85 Stat. 379; March 1, 1972, P.L. 92-40, 86 Stat. 47. It formerly appeared as *33 USC §§ 466 et seq.* and then was transferred to *33 USC §§ 1151 et seq.* The Act is shown as having been added by Act Oct. 18, 1972, without reference to intervening amendments because of the extensive amendment, reorganization and expansion of the Act's provisions by Act Oct. 18, 1972.

**Amendments:**

1977. Act Dec. 27, 1977, in subsec. (b), inserted "It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act."; and added subsec. (g).



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1987. Act Feb. 4, 1987, in subsec. (a), in para. (5), deleted "and" following "each State," in para. (6), substituted "; and" for the concluding period, and added para. (7).

Short titles:

Act June 30, 1948, ch 758, Title V, § 519 [518], as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 896 and amended Feb. 4, 1987, P.L. 100-4, Title V, § 506, in part, 101 Stat. 76; Dec. 27, 1977, P.L. 95-217, § 2, 91 Stat. 1566 provided: "This Act [33 USCS §§ 1251 et seq.] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)."

Act Oct. 18, 1972, P.L. 92-500, § 1, 86 Stat. 816, provided: "This Act [33 USCS §§ 1251 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Federal Water Pollution Control Act Amendments of 1972'."

Act Dec. 27, 1977, P.L. 95-217, § 1, 91 Stat. 1566, provided: "This Act may be cited as the 'Clean Water Act of 1977'". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 29, 1981, P.L. 97-117, § 1, 95 Stat. 1623, provided: "This Act may be cited as the 'Municipal Wastewater Treatment Construction Grant Amendments of 1981'". For full classification of such Act, consult USCS Tables volumes.

Act Feb. 4, 1987, P.L. 100-4, § 1(a), 101 Stat. 7, provides: "This Act may be cited as the 'Water Quality Act of 1987'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 14, 1988, P.L. 100-653, Title X, § 1001, 102 Stat. 3835, provides: "This title may be cited as the 'Massachusetts Bay Protection Act of 1988'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, § 1, 104 Stat. 3000, provides: "This Act may be cited as the 'Great Lakes Critical Programs Act of 1990'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, Title II, § 201, 104 Stat. 3004, provides: "This part [Title II of Act Nov. 16, 1990, P.L. 101-596] may be cited as the 'Long Island Sound Improvement Act of 1990'". For full classification of such Title, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, Title III, § 301, 104 Stat. 3006, provides: "This title may be cited as the 'Lake Champlain Special Designation Act of 1990'". For full classification of such title, consult USCS Tables volumes.

Act Oct. 31, 1994, P.L. 103-431, § 1, 108 Stat. 4396, provides: "This Act may be cited as the 'Ocean Pollution Reduction Act'". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 10, 2000, P.L. 106-284, § 1, 114 Stat. 870, provides: "This Act may be cited as the 'Beaches Environmental Assessment and Coastal Health Act of 2000'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 7, 2000, P.L. 106-457, Title II, § 201, 114 Stat. 1967, provides: "This title [amending 33 USCS § 1267 and appearing in part as a note to such section] may be cited as the 'Chesapeake Bay Restoration Act of 2000'".

Act Nov. 7, 2000, P.L. 106-457, Title IV, § 401, 114 Stat. 1973, provides: "This title [amending 33 USCS § 1269] may be cited as the 'Long Island Sound Restoration Act'".

Act Nov. 7, 2000, P.L. 106-457, Title V, § 501, 114 Stat. 1973, provides: "This title [adding 33 USCS § 1273] may be cited as the 'Lake Pontchartrain Basin Restoration Act of 2000'".

Act Nov. 7, 2000, P.L. 106-457, Title VI, § 601, 114 Stat. 1975, provides: "This title [adding 33 USCS § 1300] may be cited as the 'Alternative Water Sources Act of 2000'".

Act Nov. 27, 2002, P.L. 107-303, § 1(a), 116 Stat. 2355, provides: "This Act may be cited as the 'Great Lakes and Lake Champlain Act of 2002'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 27, 2002, P.L. 107-303, Title I, § 101, 116 Stat. 2355, provides: "This title [amending 33 USCS § 1268 and appearing in part as 33 USCS § 1271a] may be cited as the 'Great Lakes Legacy Act of 2002'".

Act Nov. 27, 2002, P.L. 107-303, Title II, § 201, 116 Stat. 2358, provides: "This title [amending 33 USCS § 1270] may be cited as the 'Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002'".

Act July 30, 2008, P.L. 110-288, § 1, 122 Stat. 2650, provides: "This Act [amending 33 USCS §§ 1322, 1342, and 1362] may be cited as the 'Clean Boating Act of 2008'".

Act Oct. 8, 2008, P.L. 110-365, § 1, 122 Stat. 4021, provides: "This Act [amending 33 USCS §§ 1268 and 1271a] may be cited as the 'Great Lakes Legacy Reauthorization Act of 2008'".

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Other provisions:

**Separability of provisions.** Act June 30, 1948, ch 758, Title V, § 512, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 894, provided: "If any provision of this Act [33 USCS §§ 1251 et seq.], or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, [33 USCS §§ 1251 et seq.] shall not be affected thereby."

**Ex. Or. No. 11548 superseded.** Ex. Or. No. 11548 of July 20, 1970, 35 Fed. Reg. 11677, formerly located at 33 USC § 1151 note, which related to the delegation of Presidential functions, was superseded by Ex. Or. No. 11735 of Aug. 3, 1973, 38 Fed. Reg. 21243, located at 33 USCS § 1321 note.

**Act Oct. 18, 1972; savings provisions.** Act Oct. 18, 1972, P.L. 92-500, § 4, 86 Stat. 896, provided:

"(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendment made by section 2 of this Act [adding 33 USCS §§ 1251 et seq.]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

"(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act, and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [33 USCS §§ 1251 et seq.].

"(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in Section 202 of the Federal Water Pollution Control Act as amended by this Act [33 USCS § 1282] and in subsection (c) of section 3 of this Act [note to this section]."

**Oversight study.** Act Oct. 18, 1972, P.L. 92-500, § 5, 86 Stat. 897, provided that the Comptroller General of the United States should conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution, including waste treatment and disposal techniques, which are conducted, supported, or assisted by any agency of the Federal Government pursuant to any Federal law or regulation and assess conflicts between, and the coordination and efficacy of, such programs, and make a report to the Congress thereon by October 1, 1973.

**International trade study.** Act Oct. 18, 1972, P.L. 92-500, § 6, 86 Stat. 898, provided:

"(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine--

"(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

"(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

"(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation--

"(A) does not require its manufacturers to implement pollution abatement and control programs,

"(B) requires a lesser degree of pollution abatement and control in its programs, or

"(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

"(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

"(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

"(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months."

**International agreements.** Act Oct. 18, 1972, P.L. 92-500, § 7, 86 Stat. 898, provided: "The President shall undertake to enter into international agreements to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums."

**National policies and goal study.** Act Oct. 18, 1972, P.L. 92-500, § 10, 86 Stat. 899, provided that the President should make a full and complete investigation and study of all of the national policies and goals established by law for the purpose of determining what the relationship should be between these policies and goals, taking into account the resources of the Nation and report the results of such investigation and study together with his recommendations to Congress not later than two years after the date of enactment of this Oct. 18, 1972.

**Efficiency study.** Act Oct. 18, 1972, P.L. 92-500, § 11, 86 Stat. 899, provided that the President should conduct a full and complete investigation and study of ways and means of utilizing in the most effective manner all of the various resources, facilities, and personnel of the Federal Government in order most efficiently to carry out the objective of 33 USCS §§ 1251 et seq. should utilize in conducting such investigation and study, the General Accounting Office, and should report the results of such investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

**Sex discrimination.** Act Oct. 18, 1972, P.L. 92-500, § 13, 86 Stat. 903, provided: "No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [33 USCS §§ 1251 et seq., generally; for full classification, consult USCS Tables volumes], the Federal Water Pollution Control Act [33 USCS §§ 1251 et seq.], or the Environmental Financing Act [33 USCS § 1281 note]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee."

**Delegation of functions to Secretary of State respecting the negotiation of international agreements relating to the enhancement of the environment.** Ex. Or. No. 11742 of Oct. 23, 1973, 38 Fed. Reg. 29457 provided: "Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) [note to this section] with respect to international agreements relating to the enhancement of the environment."

**Seafood processing study; submittal of results to Congress not later than January 1, 1979.** Act Dec. 27, 1977, P.L. 95-217, § 74, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency should conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters, and, additionally, to examine technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and submit the result of such study to Congress not later than January 1, 1979.

**Prevention, control, and abatement of environmental pollution at Federal facilities.** See Ex. Or. No. 12088 of Oct. 13, 1978, 43 Fed. Reg. 47707, located at 42 USCS § 4321 note, for provisions relating to the prevention, control, and abatement of environmental pollution at Federal facilities.

**Standards.** For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Or. No. 12088 of Oct. 13, 1978, 43 Fed. Reg. 47707, which appears as 42 USCS § 4321 note.

**Definition of Administrator.** Act Feb. 4, 1987, P.L. 100-4, § 1(d), 101 Stat. 8, provides: "For purposes of this Act, the term 'Administrator' means the Administrator of the Environmental Protection Agency."

**Limitation on payments.** Act Feb. 4, 1987, P.L. 100-4, § 2, 101 Stat. 8, provides: "No payments may be made under this Act except to the extent provided in advance in appropriation Acts."

**National shellfish indicator program.** Act Oct. 29, 1992, P.L. 102-567, Title III, § 308, 106 Stat. 4286; Nov. 10, 1998, P.L. 105-362, Title II, § 201(b), 112 Stat. 3282, provides:

"(a) Establishment of a research program. The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the 'Program') for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act, the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for--

"(1) environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

"(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

"(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

"(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

"(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

"(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

"(b) Advisory committee.

(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the 'Committee') shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

"(2) The Committee shall--

"(A) identify priorities for achieving the purpose of the Program;

"(B) review and recommend approval or disapproval of Program work plans and plans of operation;

"(C) review and comment on all subcontracts and grants to be awarded under the Program;

"(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

"(E) provide such other advice on the Program as is appropriate.

"(3) The Committee shall consist of at least ten members and shall include--

"(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

"(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference executive Board), of whom one shall represent the shellfish industry in each region;

"(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

"(D) one member representing the Shellfish Institute of North America.

"(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

"(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

"(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee but shall receive travel expenses as authorized by *section 5703 of title 5, United States Code*.

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"(c) Contract with consortium. Within 30 days after the date of enactment of this Act, the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will--

"(1) be the academic administrative organization and fiscal agent for the Program;

"(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);

"(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;

"(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;

"(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and

"(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.

"(d) Authorization of appropriations.

(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98-210; 97 Stat. 1409) [unclassified], there are authorized to be appropriated to the Secretary of Commerce \$ 5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.

"(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.

"(e) Definitions. As used in this section, the term--

"(1) 'Consortium' means the Louisiana Universities Marine Consortium; and

"(2) 'shellfish' means any species of oyster, clam, or mussel that is harvested for human consumption."

**NOTES:**

Code of Federal Regulations:

Environmental Protection Agency--Nonprocurement debarment and suspension, *2 CFR 1532.10* et seq.

Natural Resources Conservation Service, Department of Agriculture--Rural clean water program, *7 CFR 634.1* et seq.

Environmental Protection Agency--Cross-media electronic reporting, *40 CFR 3.1* et seq.

Environmental Protection Agency--Nondiscrimination in programs receiving Federal assistance from the Environmental Protection Agency, *40 CFR 7.10* et seq.

Environmental Protection Agency--OMB approvals under the Paperwork Reduction Act, *40 CFR 9.1* et seq.

Environmental Protection Agency--Public participation in programs under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act, *40 CFR 25.1* et seq.

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#### Interpretive Notes and Decisions:

**I. IN GENERAL** 1. Generally 2. Constitutionality 3. Purpose 4. Construction 5. Legislative intent 6. Relationship with other laws 7.--Other environmental laws 8.--Federal common law of nuisance 9.--Civil rights laws 10. Effect on state and local law 11.--More stringent standards 12. Effect on existing remedies

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#### **I. IN GENERAL 1. Generally**

Control of pollution in interstate streams may be appropriate subject for national legislation. *West Virginia ex rel. Dyer v Sims* (1951) 341 US 22, 95 L Ed 713, 71 S Ct 557, 44 Ohio Ops 364, 62 Ohio L Abs 584.

Language of Federal Water Pollution Control Act and its legislative history show that Congress was convinced that uncontrolled pollution of nation's waterways is threat to health and welfare of country, as well as threat to interstate commerce. *United States v Ashland Oil & Transp. Co.* (1974, CA6 Ky) 504 F2d 1317, 7 Envt Rep Cas 1114, 4 ELR 20784, 50 OGR 133.

Seventh Amendment requires jury trial to determine liability, but not amount of fine, in action by Federal Government seeking civil penalties under Clean Water Act (33 USCS §§ 1251 et seq.). *United States v M.C.C. of Florida, Inc.* (1988, CA11 Fla) 848 F2d 1133, 27 Envt Rep Cas 2271, 18 ELR 21080.

Clean Water Act (33 USCS §§ 1251 et seq.) permits blanket prohibition and other "stringent pollution restrictions" to be imposed even where discharge caused no discernible harm to environment; accordingly, Environmental Protection Agency adequately supported regulation prohibiting discharge of toxic-carrying diesel pills in relatively small volumes, despite claim by oil companies that they pose no environmental threat when discharged in relatively small volumes of mud typical of Alaskan off-shore drilling operations. *American Petroleum Inst. v United States EPA* (1988, CA5) 858 F2d 261, 28 Envt Rep Cas 1529, 19 ELR 20317, 102 OGR 443, reh den, en banc, clarified (1989, CA5) 864 F2d 1156, 102 OGR 453.

Victims of violations of Clean Water Act are public. *United States v Snook* (2004, CA7 Ill) 366 F3d 439 (criticized in *United States v Atl. States Cast Iron Pipe Co.* (2009, DC NJ) 627 F Supp 2d 180).

#### **2. Constitutionality**

33 USCS § 1251

Provisions of Water Pollution Control Act Amendments of 1972 are constitutional. *United States v Ashland Oil & Transp. Co.* (1974, CA6 Ky) 504 F2d 1317, 7 *Env't Rep Cas* 1114, 4 *ELR* 20784, 50 *OGR* 133.

Regulation of wetlands under Clean Water Act (33 USCS §§ 1251 et seq.) does not violate commerce clause of US Constitution; as applied to government's suit under Clean Water Act (33 USCS §§ 1251 et seq.) against owner of various alleged wetlands for dumping fill thereon, regulatory definition of wetlands as those areas that are inundated or saturated by surface or ground water at frequency and duration sufficient to support, and that under normal circumstances do support, prevalence of vegetation typically adapted to life in saturated soil conditions, is not unconstitutionally vague. *United States v Tull* (1985, CA4 Va) 769 F2d 182, 24 *Env't Rep Cas* 1495, 3 *FR Serv* 3d 1421, 15 *ELR* 21061, *rev'd* on other grounds, *remanded* (1987) 481 US 412, 107 S Ct 1831, 95 L Ed 2d 365, 25 *Env't Rep Cas* 1857, 7 *FR Serv* 3d 673, 17 *ELR* 20667 (criticized in *Feltner v Columbia Pictures TV* (1998) 523 US 340, 118 S Ct 1279, 140 L Ed 2d 438, 98 CDOS 2324, 98 *Daily Journal DAR* 3175, 26 *Media L R* 1513, 46 *USPQ2d* 1161, 1998 *Colo J C A R* 1542, 11 *FLW Fed S* 417, 163 *ALR Fed* 721) and (criticized in *SEC v First Pac. Bancorp* (1998, CA9 Cal) 142 F3d 1186, 98 CDOS 3143, 98 *Daily Journal DAR* 4343, *CCH Fed Secur L Rep P* 90197) and (criticized in *State v Irving Oil Corp.* (2008) 183 *Vt* 386, 2008 *VT* 42, 955 *A2d* 1098).

Federal Water Pollution Control Act's citizen's suit provision (33 USCS § 1365) does not violate separation of powers doctrine, nor does authorization of civil penalty enforcement power in hands of private parties amount to unconstitutional delegation. *Student Public Interest Research Group, Inc. v Monsanto Co.* (1985, DC NJ) 600 *F Supp* 1474, 22 *Env't Rep Cas* 1132, 15 *ELR* 20294.

Landowner had not established partial regulatory taking under Fifth Amendment where landowner had presented no evidence that property's fair market value had been adversely affected, and because Clean Water Act was already effective at time landowner purchased land, landowner could not claim any adverse impact to his investment expectations. *United States v Donovan* (2006, DC Del) 466 *F Supp* 2d 590.

### 3. Purpose

Construing "discharge" in accordance with its ordinary or natural meaning--when applied to water, "flowing or issuing out"--plaintiff processing plant owner's operation of dam to produce hydroelectricity could result in any discharge into navigable waters, and thus, he was required to obtain state certification under § 401 of Clean Water Act, 33 USCS § 1341; Act did not stop at controlling "addition of pollutants," but dealt with "pollution" generally, 33 USCS § 1251(b), which Congress defined under 33 USCS § 1362(19) to mean man-made or man-induced alteration of chemical, physical, biological, and radiological integrity of water, and, as stated in 33 USCS § 1251(b), policy was to recognize, preserve, and protect primary responsibilities and rights of states to prevent, reduce, and eliminate pollution. *S. D. Warren Co. v Me. Bd. of Envtl. Prot.* (2006) 547 US 370, 126 S Ct 1843, 164 L Ed 2d 625, 62 *Env't Rep Cas* 1257, 19 *FLW Fed S* 193, 17 *ALR Fed* 2d 807.

It is intent of Clean Water Act (33 USCS §§ 1251 et seq.) to cover as much as possible all waters of United States instead of just some, and to regulate such waters to fullest extent possible under commerce clause. *Quivira Mining Co. v United States EPA* (1985, CA10) 765 F2d 126, 22 *Env't Rep Cas* 2003, 15 *ELR* 20530, *cert den* (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 *Env't Rep Cas* 1872 (criticized in *FD&P Enters. v United States Army Corps of Eng'rs* (2003, DC NJ) 239 *F Supp* 2d 509, 33 *ELR* 20140).

Term "navigable waters," in 33 USCS § 1251 provision stating that it is national goal that discharge of pollutants into navigable waters be eliminated by 1985, means waters of United States, including territorial seas. *Quivira Mining Co. v United States EPA* (1985, CA10) 765 F2d 126, 22 *Env't Rep Cas* 2003, 15 *ELR* 20530, *cert den* (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 *Env't Rep Cas* 1872 (criticized in *FD&P Enters. v United States Army Corps of Eng'rs* (2003, DC NJ) 239 *F Supp* 2d 509, 33 *ELR* 20140).

Protection of wetlands, as important wildlife refuge, is legitimate purpose for which Clean Water Act (33 USCS §§ 1251 et seq.) was intended, and justifies any incidental effect of permit requirement, under 33 USCS § 1344, and of co-incident refusal to apply 33 USCS § 1251(g), on farmer's state-allocated water rights, since accommodations between Act's purpose and farmer's efforts to engage wetlands in upland farming on regular basis are best reached in individual permit process. *United States v Akers* (1986, CA9 Cal) 785 F2d 814, 24 *Env't Rep Cas* 1121, 16 *ELR* 20538, *cert den* (1986) 479 US 828, 93 L Ed 2d 56, 107 S Ct 107, 25 *Env't Rep Cas* 1856.

Purpose of Water Pollution Control Act, as indicated by legislative history, is to establish means whereby comprehensive programs for water pollution control may be developed and implemented by Environmental Protection Agency. *Sierra Club v Lynn* (1973, WD Tex) 364 *F Supp* 834, 5 *Env't Rep Cas* 1737, 5 *Env't Rep Cas* 1745, 4 *ELR* 20110, *aff'd* in



part and revd in part on other grounds (1974, CA5 Tex) 502 F2d 43, 7 *Env't Rep Cas* 1033, 4 *ELR* 20844, reh den (1974, CA5 Tex) 504 F2d 760 and cert den (1975) 421 US 994, 44 L Ed 2d 484, 95 S Ct 2001 and cert den (1975) 422 US 1049, 45 L Ed 2d 701, 95 S Ct 2668, reh den (1975) 423 US 884, 46 L Ed 2d 115, 96 S Ct 158.

Purpose of Federal Water Pollution Control Act (33 USCS §§ 1151 et seq.) and its 1972 Amendments (33 USCS §§ 1251 et seq.) was not to preempt but to supplement and amplify any preexisting remedies. *Illinois ex rel. Scott v Milwaukee* (1973, ND Ill) 366 F Supp 298, 5 *Env't Rep Cas* 2018, 4 *ELR* 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

Federal Water Pollution Control Act was designed to deal with all facts of recapturing and preserving biological integrity of nation's water by creating web of complex interrelated regulatory programs. *United States v Holland* (1974, MD Fla) 373 F Supp 665, 6 *Env't Rep Cas* 1388, 4 *ELR* 20710.

Federal Water Pollution Control Act was designed to exercise federal regulatory jurisdiction over activities which impair navigation; Act was enacted to prevent entry of pollutants into navigable waters and to this end pollution must be controlled at its source before pollution endangers coastal environment. *P. F. Z. Properties, Inc. v Train* (1975, DC Dist Col) 393 F Supp 1370, 7 *Env't Rep Cas* 1930.

Clean Water Act, as set forth in 33 USCS § 1251(a), is comprehensive statute designed to restore and maintain chemical, physical, and biological integrity of Nation's waters. *St. Andrews Park, Inc. v United States Dep't of the Army Corps of Eng'rs* (2004, SD Fla) 314 F Supp 2d 1238, 17 *FLW Fed D* 526.

Mineral resources should be developed responsibly, keeping in mind those other values that are so important to people of State of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle; purpose of National Environmental Policy Act of 1969 and Clean Water Act is to require agencies to take notice of these values as integral part of decision-making process. *Wyo. Outdoor Council v United States Army Corps of Eng'rs* (2005, DC Wyo) 351 F Supp 2d 1232, 59 *Env't Rep Cas* 2038, 166 *OGR* 407.

Motion of plant manager's and corporation to dismiss and for bill of particulars as to Count One of second superseding indictment that contained 19 substantive counts relating to criminal violations of Clean Water Act was denied, except to limited extent that Government had agreed to provide bill of particulars as to regulations, permit limits, or other requirements. *United States v Hajduk* (2005, DC Colo) 370 F Supp 2d 1103, 60 *Env't Rep Cas* 1534.

Purpose of Clean Water Act, 33 USCS §§ 1251 et seq., is to restore and maintain physical, biological and chemical integrity of Nation's waters, Clean Water Act § 101(a), 33 USCS § 1251(a); in pursuit of this goal, and subject to certain exceptions, Act prohibits discharge of any pollutant, Clean Water Act § 301(a), 33 USCS § 1311(a). *API v Johnson* (2008, DC Dist Col) 541 F Supp 2d 165, 67 *Env't Rep Cas* 1497, 38 *ELR* 20081.

#### 4. Construction

Water pollution legislation is to be given generous rather than niggardly construction, notwithstanding penal provisions. *United States v Hamel* (1977, CA6 Mich) 551 F2d 107, 9 *Env't Rep Cas* 1932, 7 *ELR* 20253.

EPA has permissibly construed Clean Water Act, 33 USCS §§ 1251 et seq., in defining as "discharge from Concentrated Animal Feeding Operation (CAFO)" discharge of manure, litter or process wastewater to waters of U.S. from CAFO as result of application of that manure, litter or process wastewater by CAFO to land areas under its control pursuant to 40 C.F.R. § 122.23(e); land application areas are integral and indeed indispensable part of CAFO operations; CAFOs depend on them to receive volumes of manure their animals generate. *Waterkeeper Alliance, Inc. v United States EPA* (2005, CA2) 399 F3d 486, 59 *Env't Rep Cas* 2089, 35 *ELR* 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

Federal Water Pollution Control Amendments of 1972 amplified previous federal statutory authority relating to water pollution; such amendments prohibit discharge of pollutant by any person unless permitted otherwise in Act and reach all waters of United States in geographical sense in order to control pollution at its source; such amendments thus extend federal authority over water pollution beyond mean high tide line; by recognizing federal authority to act when offensive matter is discharged from "any point source" government is authorized to prevent entry of pollutants into navigable waters; Federal Water Pollution Control Act was designed to exercise federal regulatory jurisdiction over activities which impair navigation; Act was enacted to prevent entry of pollutants into navigable waters and to this end pollution must be controlled at its source before pollution endangers coastal environment. *P. F. Z. Properties, Inc. v Train* (1975, DC Dist Col) 393 F Supp 1370, 7 *Env't Rep Cas* 1930.

Section 101(g) of Clean Water Act, 33 USCS § 1251(g), does not prohibit conditioning water quality certification on maintenance of specified instream flows necessary to meet State's water quality standards promulgated under Act and necessary to protect designated uses, and to meet federal and state antidegradation policies, regardless of whether applicant has existing water rights. *Public Util. Dist. No. 1 v Dep't of Ecology* (2002) 146 Wash 2d 778, 51 P3d 744.

#### 5. Legislative intent

Clean Water Act (33 USCS §§ 1251 et seq.) expresses congressional insistence to eliminate water pollution within short time-span through use of uniform effluent limitations imposed on industry-wide basis. *Reynolds Metal Co. v United States EPA* (1985, CA4) 760 F2d 549, 22 Env't Rep Cas 1794, 15 ELR 20736.

While Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) contains no mechanism for direct federal regulation of nonpoint source pollution, legislative history makes clear that omission was due not to Congress' concern for state autonomy, but simply to its recognition that control of nonpoint source pollution was so dependent upon site-specific factors that its uniform federal regulation was virtually impossible but structure and legislative history of act provide no support for contention that Congress intended Environmental Protection Agency to play no role in controlling nonpoint source pollution and nothing in language or legislative history indicates congressional intent specifically to preclude EPA from imposing conditions on construction grants that are designed to reduce amount of nonpoint source pollution generated, either directly or indirectly, by facilities grants fund. *Shanty Town Assoc. Ltd. Partnership v Environmental Protection Agency* (1988, CA4 Md) 843 F2d 782, 27 Env't Rep Cas 1540, 18 ELR 21227.

Environmental Protection Agency erred by denying environmental groups' petition to review National Pollution Discharge Elimination System permit issued under Clean Water Act, 33 USCS § 1342, allowing mining company to discharge toxic levels of copper into already toxic desert creek; under 40 C.F.R. § 122.4(i), no permit could issue because new discharge would contribute to violation of water quality policy standards listed in 33 USCS § 1251(a)(3). *Friends of Pinto Creek v United States EPA* (2007, CA9) 504 F3d 1007, 65 Env't Rep Cas 1289, 37 ELR 20255, cert den (2009, US) 129 S Ct 896, 173 L Ed 2d 106, 68 Env't Rep Cas 1480.

Express intent of FWPCA was to streamline decision-making and insure prompt high-level judicial review; this policy indicates congressional determination to vest jurisdiction over discharge regulation in Courts of Appeal. *Shell Oil Co. v Train* (1976, ND Cal) 415 F Supp 70, aff'd (1978, CA9 Cal) 585 F2d 408, 12 Env't Rep Cas 1547, 9 ELR 20023.

Treating §§ 309 and 311 of Clean Water Act (CWA), 33 USCS §§ 1319 and 1321, as alternatives in the case of oil spills furthers purpose behind CWA to restore and maintain chemical, physical, and biological integrity of nation's waters. *United States v Colonial Pipeline Co.* (2002, ND Ga) 242 F Supp 2d 1365, 55 Env't Rep Cas 2015, 158 OGR 1048.

#### 6. Relationship with other laws

Environmental Protection Agency has no authority under Federal Water Pollution Control Act, as amended in 1972 (33 USCS §§ 1251 et seq.), to regulate discharge into nation's waterways of nuclear waste materials subject to regulation by Atomic Energy Commission and its successors under Atomic Energy Act of 1954 (42 USCS §§ 2011 et seq.). *Train v Colorado Public Interest Research Group, Inc.* (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 Env't Rep Cas 2057, 6 ELR 20549.

Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) does not abrogate doctrine of res judicata, and if state court enters final judgment on identical issue EPA cannot invoke Act to avoid any preclusive effect that judgment may have. *United States v ITT Rayonier, Inc.* (1980, CA9 Wash) 627 F2d 996, 16 Env't Rep Cas 1091, 10 ELR 20945.

Corps' decision to leave wetlands in tact obviously reflects weight given to environmental protection of wetlands and does not constitute taking subject to review under 28 USCS § 1346 or 5 USCS § 702. *Allain-Lebreton Co. v Department of Army, etc.* (1982, CA5 La) 670 F2d 43, 17 Env't Rep Cas 1169, 12 ELR 20605.

Legitimate sewage discharge can be proper exercise of government's police powers, but Clean Water Act (33 USCS §§ 1251 et seq.) imposes severe limitation on right to discharge sewage or other pollutants into nation's waterways, and under state constitutional provision that private property shall not be taken for public use without just compensation, pollution can amount to "taking." *Stoddard v Western Carolina Regional Sewer Authority* (1986, CA4 SC) 784 F2d 1200, 23 Env't Rep Cas 2105, 16 ELR 20503 (criticized in *St. John's Organic Farm v Gem County Mosquito Abatement Dist.* (2009, CA9 Idaho) 2009 US App LEXIS 17568).

33 USCS § 1251

Any incidental effect of permit requirement, under 33 USCS § 1344, and of coincident refusal to apply 33 USCS § 1251(g), on farmer's state-allocated water rights is justified, since protection of wetlands, as important wildlife refuge, is legitimate purpose for which Clean Water Act (33 USCS §§ 1251 et seq.) was intended, and accommodations are best reached in individual permit process. *United States v Akers* (1986, CA9 Cal) 785 F2d 814, 24 *Env't Rep Cas* 1121, 16 *ELR* 20538, cert den (1986) 479 US 828, 93 L Ed 2d 56, 107 S Ct 107, 25 *Env't Rep Cas* 1856.

There is no question but that Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) applies in Puerto Rico notwithstanding Puerto Rico Federal Relations Act (48 USCS §§ 7031 et seq.) and proceedings in the Commonwealth courts not involving identical issues do not constitute bar to raising federal claims before courts of United States. *United States v Rivera Torres* (1987, CA1 Puerto Rico) 826 F2d 151, 26 *Env't Rep Cas* 1374, 17 *ELR* 21285.

Company whose sewage treatment plant design was approved by EPA is not entitled to contribution from EPA for damages that might be awarded to plant owner that sued company as result of plant not meeting federal permit requirements since 28 USCS § 2680(h) "misrepresentation" exception to government's waiver of sovereign immunity under Federal Tort Claims Act (28 USCS §§ 1346(b) and 2671 et seq.) bars contribution action against EPA. *Garland v Zurn Industries, Inc.* (1989, CA5 Tex) 870 F2d 320, 29 *Env't Rep Cas* 1753, 19 *ELR* 21297.

In action challenging fire-recovery timber sale in drainage area of national forest, environmental group has standing to sue under APA for violations of state water quality control plan pursuant to Clean Water Act. *Marble Mountain Audubon Soc'y v Rice* (1990, CA9 Cal) 914 F2d 179, 32 *Env't Rep Cas* 1249, 21 *ELR* 20023.

Distinction between jurisdiction of Resource Conservation and Reconstruction Act and Clean Water Act is defined by regulation stating that only actual discharges from holding pond into surface waters are governed by CWA, not contents of pond or discharges into it. *United States v Dean* (1992, CA6 Tenn) 969 F2d 187, 35 *Env't Rep Cas* 1255, 22 *ELR* 21296, reh, en banc, den (1992, CA6) 1992 US App LEXIS 20353 and cert den (1993) 507 US 1033, 123 L Ed 2d 475, 113 S Ct 1852 and (superseded by statute as stated in *United States v Okoli* (1994, CA5 Tex) 20 F3d 615).

Interagency Coordination Agreement (ICA) does not add new conflicting requirements that prospective permittees must satisfy; source of those conflicting requirements, to extent they exist, is in congressional decision in Clean Water Act, 33 USCS §§ 1251 et seq., to establish partnership between states and federal government; conflicting requirements are pervasive feature of regulatory landscape, not something that ICA created. *Home Builders Ass'n v United States Army Corps of Eng'rs* (2003, CA7 Ill) 335 F3d 607, 56 *Env't Rep Cas* 1812, 33 *ELR* 20236.

Because Second Circuit believes that terms of nutrient management plans constitute effluent limitations, Second Circuit holds that Concentrated Animal Feeding Operation Rule, codified at 40 C.F.R. pts. 9, 122, 123, 412--by failing to require that terms of nutrient management plans be included in National Pollutant Discharge Elimination System permits--violates Clean Water Act, 33 USCS §§ 1251 et seq., and is otherwise arbitrary and capricious in violation of *Administrative Procedure Act*. *Waterkeeper Alliance, Inc. v United States EPA* (2005, CA2) 399 F3d 486, 59 *Env't Rep Cas* 2089, 35 *ELR* 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

District court did not abuse its discretion when it determined that new trial under *Fed. R. Crim. P.* 33 based upon Nationwide Permit No. 3, 67 *Fed. Reg.* 2078 (Jan. 15, 2002) was not appropriate following defendant's criminal conviction for violating Clean Water Act (CWA), 33 USCS §§ 1251 et seq.; Permit was issued pursuant to Rivers and Harbors Act, 33 USCS § 403, and did not apply to activities covered by CWA. *United States v Moses* (2007, CA9 Idaho) 496 F3d 984, 64 *Env't Rep Cas* 1993, 37 *ELR* 20206, cert den (2008, US) 128 S Ct 2963, 171 L Ed 2d 886 and (criticized in *Pecanic Baykeeper, Inc. v Suffolk County* (2008, ED NY) 585 F Supp 2d 377, 68 *Env't Rep Cas* 2072).

Government's invocation of Clean Water Act limitations on discharge from plaintiff's gold placer mine may have such negative economic impact on value and investment that genuine issues of fact preclude summary judgment in plaintiff's suit for compensation for government taking. *Rybachek v United States* (1991) 23 Cl Ct 222, 33 *Env't Rep Cas* 1473.

Provisions of Federal Water Pollution Control Act Amendments of 1972 (33 USCS §§ 1251 to 1376) do not fall within limited exception of Puerto Rican Federal Relations Act (48 USCS § 734) for locally inapplicable federal statutes, but apply to both navigable and nonnavigable waters of Puerto Rico. *Puerto Rico v Alexander* (1977, DC Dist Col) 438 F Supp 90, 10 *Env't Rep Cas* 1575, 7 *ELR* 20751.

Court will not rubberstamp agency determination that fails to consider cumulative impacts, fails to realistically assess impacts to ranchlands, and relies on unsupported, unmonitored mitigation measures; National Environmental Pol-

33 USCS § 1251

icy Act of 1969 and Clean Water Act require more. *Wyo. Outdoor Council v United States Army Corps of Eng'rs* (2005, DC Wyo) 351 F Supp 2d 1232, 59 Env't Rep Cas 2038, 166 OGR 407.

In issuing general permit authorizing discharge of dredge and fill materials associated with several activities related to oil and gas development, Army Corps of Engineers violated National Environmental Policy Act of 1969 by failing to consider permit's cumulative impacts; fact that cumulative impacts were not discussed in relation to any resource other than wetlands necessitated conclusion that Corps could not have found cumulative effects of permit to be minimal in order to comply with *Clean Water Act*. *Wyo. Outdoor Council v United States Army Corps of Eng'rs* (2005, DC Wyo) 351 F Supp 2d 1232, 59 Env't Rep Cas 2038, 166 OGR 407.

**7.--Other environmental laws**

Compliance with federal water quality standards developed under amended Federal Water Pollution Control Act (predecessor to 33 USCS §§ 1251 et seq.) would not immunize defendant from prosecution for discharges without permit under 33 USCS § 407. *United States v United States Steel Corp.* (1973, CA7 Ind) 482 F2d 439, 3 ELR 20388, cert den (1973) 414 US 909, 38 L Ed 2d 147, 94 S Ct 229.

Federal environmental protection statutes did not enlarge jurisdiction of Army Corps of Engineers under Rivers and Harbors Act (33 USCS § 401); developers did not need permit under Act to complete dredge and fill operation begun in 1951 where all land was substantially above mean high tide, but deposit of dredging material into navigable lagoon after its creation subjected developers to permit program administered under Federal Water Pollution Control Act Amendment of 1972 (33 USCS § 1251). *United States v Stoeco Homes, Inc.* (1974, CA3 NJ) 498 F2d 597, 6 Env't Rep Cas 1757, 4 ELR 20390, cert den (1975) 420 US 927, 43 L Ed 2d 397, 95 S Ct 1124.

Remedial investigation feasibility study agreed to by operator and owner of landfill site, and as directed by EPA work plan, was remedial action or removal action and district court therefore properly dismissed suit, on ground of lack of subject matter jurisdiction, brought by operator against owner for violating *Clean Water Act*. *Razore v Tulalip Tribes* (1995, CA9 Wash) 66 F3d 236, 95 CDOS 7354, 95 Daily Journal DAR 12580, 41 Env't Rep Cas 1701, 32 FR Serv 3d 1451, 26 ELR 20063.

Federal district court's order vacating Clean Water Act (CWA), 33 USCS §§ 1251 et seq., permits issued by Army Corps of Engineers allowing limestone to be mined from wetlands that was home to endangered wood stork and provided aquifer for major metropolitan area was vacated because court failed to apply proper deferential standard of review under Administrative Procedure Act, 5 USCS § 706(2), to Corps' decision; district court failed to confine its analysis to whether Corps had procedurally complied with National Environmental Policy Act, 42 USCS § 4332(C), and erroneously engaged in substantive analysis of whether Corps should have granted permits under CWA. *Sierra Club v Flowers* (2008, CA11 Fla) 526 F3d 1353, 66 Env't Rep Cas 1904, 38 ELR 20113, 21 FLW Fed C 671.

Endangered Species Act's objective (to provide program and means to conserve endangered species and their ecosystems, 16 USCS § 1531(b)), is surely intertwined with that of Clean Water Act (to restore and maintain chemical, physical, and biological integrity of nation's waters, 33 USCS § 1251(a)). *N. Cal. River Watch v Wilcox* (2011, CA9 Cal) 633 F3d 766, 41 ELR 20084.

Predecessor to 33 USCS § 1251 did not impliedly repeal 33 USCS § 441. *United States v Vulcan Materials Co.* (1970, DC NJ) 320 F Supp 1378, 2 Env't Rep Cas 1145, 1 ELR 20086.

Federal Water Pollution Control Act amendments of 1972 did not repeal Refuse Act (33 USCS §§ 403, 407, and 409). *United States v Consolidation Coal Co.* (1973, ND W Va) 354 F Supp 173, 3 ELR 20425.

General demarcation line between jurisdiction of FWPCA (33 USCS §§ 1251 et seq.) and Marine Protection Act (33 USCS §§ 1401 et seq.), with exception of pipes or outfalls, is 3-mile limit of territorial seas. *Pacific Legal Foundation v Quarles* (1977, CD Cal) 440 F Supp 316, 10 Env't Rep Cas 1369, 7 ELR 20653, aff'd (1980, CA9 Cal) 614 F2d 225, 14 Env't Rep Cas 1111, 10 ELR 20271, cert den (1980) 449 US 825, 66 L Ed 2d 29, 101 S Ct 88, 14 Env't Rep Cas 2208.

Fish and Wildlife Service (FWS) was entitled to summary judgment in action under 16 USCS § 1540(g)(1)(A), which was filed by builder associations challenging FWS' designation of Central California population of California tiger salamander as "threatened" under Endangered Species Act, 16 USCS §§ 1531 et seq.; FWS considered inadequacy of existing regulatory mechanisms as required by 16 USCS § 1533(a)(1), and it rationally concluded that there was inadequate protection under Clean Water Act, 33 USCS §§ 1251 et seq., California Streambed Alteration Act, *Cal. Fish &*

*Game Code § 1600 et seq.*, California Environmental Quality Act, *Cal. Pub. Res. Code §§ 21000 et seq.*, and California Porter-Cologne Water Quality Control Act, *Cal. Water Code §§ 13000 et seq.* *Home Builders Ass'n v United States Fish & Wildlife Serv.* (2007, ND Cal) 529 F Supp 2d 1110, affd (2009, CA9 Cal) 321 Fed Appx 704.

Meaning of "applicable water quality standards" for both Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) and River and Harbor Act of 1970 includes both state water quality criteria and plan for implementation and enforcement of such criteria. USEPA GCO 76-11.

#### 8.--Federal common law of nuisance

No federal common law remedy is available to state to seek abatement of nuisance caused by interstate water pollution resulting from overflows of untreated sewage and discharges of inadequately treated sewage by municipality in neighboring state, Congress not having left appropriate federal standards to courts through application of nuisance concepts and maxims of equity jurisprudence, but rather having occupied field through establishment under Federal Water Pollution Control Act Amendments of 1972 (33 USCS §§ 1251 et seq.) of comprehensive regulatory program supervised by expert administrative agency. *Milwaukee v Illinois* (1981) 451 US 304, 68 L Ed 2d 114, 101 S Ct 1784, 15 Env't Rep Cas 1908, 11 ELR 20406.

There is no body of federal common law to which private citizen could resort in seeking injunctive relief against stream pollution by sewage treatment plant operating under permit issued in accordance with Federal Water Pollution Control Act and authorization of EPA where (1) controversy was strictly local, (2) there was no claim of indication of rights of another state, and (3) there was no allegation of any interstate effect. *Committee for Consideration of Jones Falls Sewage System v Train* (1976, CA4 Md) 539 F2d 1006, 9 Env't Rep Cas 1212, 6 ELR 20703 (criticized in *Connecticut v Am. Elec. Power Co.* (2009, CA2 NY) 582 F3d 309).

Maritime tort claims for damages resulting from water pollution, based on nuisance theory, have been pre-empted by enactment of Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) and Maritime Protection, Research, and Sanctuaries Act of 1972 (33 USCS §§ 1401 et seq.). *Conner v Aerovox, Inc.* (1984, CA1 Mass) 730 F2d 835, 20 Env't Rep Cas 1877, 1984 AMC 2507, 14 ELR 20370, cert den (1985) 470 US 1050, 84 L Ed 2d 812, 105 S Ct 1747, 22 Env't Rep Cas 1784.

Federal common law of nuisance in area of water pollution is entirely pre-empted by more comprehensive scope of Federal Water Pollution Control Act, 33 USCS §§ 1251 et seq. *National Audubon Soc. v Department of Water* (1988, CA9 Cal) 869 F2d 1196.

Federal common law nuisance claims concerning water pollution are preempted by Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) since Supreme Court has unequivocally so stated. *National Audubon Soc. v Department of Water* (1988, CA9 Cal) 869 F2d 1196.

In action brought by United States and State of Illinois to refrain steel corporation from discharging waste water into Lake Michigan, Public Law 92-500 was held as not abolishing federal common law of nuisance, but rather as manifesting intention to supplement and amplify pre-existing remedies. *United States ex rel. Scott v United States Steel Corp.* (1973, ND Ill) 356 F Supp 556, 5 Env't Rep Cas 1125, 3 ELR 20204.

Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) as amended in 1972 (33 USCS §§ 1251 et seq.) did not preempt state of Illinois from seeking abatement in Federal District Court of federal common law nuisance in interstate or navigable waters. *Illinois ex rel. Scott v Milwaukee* (1973, ND Ill) 366 F Supp 298, 5 Env't Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

State law claims against out-of-state dischargers are pre-empted by comprehensive federal statute (33 USCS §§ 1251 et seq.) which in turn pre-empts federal common law because uniformity in interstate regulation of pollution is concern of same magnitude whatever form federal response may take. *Chicago Park Dist. v Sanitary Dist. of Hammond* (1981, ND Ill) 530 F Supp 291, 18 Env't Rep Cas 1372, 13 ELR 20372.

#### 9.--Civil rights laws

Congress has foreclosed 42 USCS § 1983 remedy under 33 USCS §§ 1251 et seq. *Love v New York State Dep't of Environmental Conservation* (1981, SD NY) 529 F Supp 832, 17 Env't Rep Cas 2083, 12 ELR 20571.

33 USCS § 1251

Civil rights suit against operator of hazardous waste treatment and disposal facility is precluded by federal statutory scheme dealing with air and water pollution that provides for citizens' suits in such instances. *Reeger v Mill Service, Inc.* (1984, WD Pa) 593 F Supp 360, 21 Env't Rep Cas 2165, 14 ELR 20900.

Court has authority to exercise its discretion to adjudicate pendent state law claims in plaintiff's action alleging violation of state wetlands act, as pendent state claim to suit brought pursuant to Clean Water Act 33 USCS §§ 1251 et seq.). *Norfolk v Harold* (1987, ED Va) 662 F Supp 959.

Parties' joint motion to amend consent decree is granted, where original decree resolved power company's violations of Clean Water Act (33 USCS §§ 1251 et seq.) via, inter alia, provision of \$ 7.5 million fund for acquisition and restoration of wetlands near nuclear generating station, but company's recent financial difficulties have raised doubts about completion of plan, because proposed amendment provides for immediate acquisition and expenditure of funds on crucial wetlands restoration projects throughout Southern California, in furtherance of Act's purpose to restore and maintain integrity of nation's waters. *Earth Island Inst., Inc. v S. Cal. Edison* (2001, SD Cal) 166 F Supp 2d 1304.

**10. Effect on state and local law**

No federal common law remedy is available to state to seek abatement of nuisance caused by interstate water pollution resulting from overflows of untreated sewage and discharges of inadequately treated sewage by municipality in neighboring state, Congress not having left appropriate federal standards to courts through application of nuisance concepts and maxims of equity jurisprudence, but rather having occupied field through establishment under Federal Water Pollution Control Act Amendments of 1972 (33 USCS §§ 1251 et seq.) of comprehensive regulatory program supervised by expert administrative agency. *Milwaukee v Illinois* (1981) 451 US 304, 68 L Ed 2d 114, 101 S Ct 1784, 15 Env't Rep Cas 1908, 11 ELR 20406.

It is not arbitrary or capricious for EPA to reject state water quality standards and to promulgate its own standards upon refusal of state to modify its standards; EPA need not consider economic factors when setting its criteria. *Mississippi Com. on Natural Resources v Costle* (1980, CA5 Miss) 625 F2d 1269, 15 Env't Rep Cas 1256, 10 ELR 20931.

Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) does not abrogate doctrine of res judicata, and if state court enters final judgment on identical issue EPA cannot invoke Act to avoid any preclusive effect that judgment may have. *United States v ITT Rayonier, Inc.* (1980, CA9 Wash) 627 F2d 996, 16 Env't Rep Cas 1091, 10 ELR 20945.

In enacting Clean Water Act (33 USCS §§ 1251 et seq.), Congress has clearly expressed its intent to allow states to take active role in abating water pollution; however, federal/state partnership in pollution regulation applies only to waters within states' jurisdiction. *Chevron U.S.A., Inc. v Hammond* (1984, CA9 Alaska) 726 F2d 483, 20 Env't Rep Cas 1505, 1984 AMC 1027, 14 ELR 20305, cert den (1985) 471 US 1140, 86 L Ed 2d 703, 105 S Ct 2686, 22 Env't Rep Cas 2071, 1985 AMC 2395.

Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) precludes application of state's common or statutory law to determine liability and afford remedy for discharges, in particular by municipality, within another state. *Illinois v Milwaukee* (1984, CA7 Ill) 731 F2d 403, 20 Env't Rep Cas 1801, 14 ELR 20359, cert den (1985) 469 US 1196, 83 L Ed 2d 981, 105 S Ct 979, 105 S Ct 980, 22 Env't Rep Cas 1071.

State township's prohibition of floating homes in ecologically fragile area is not preempted by federal ship licensing requirements in 46 USCS § 12109 or Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.). *Bass River Associates v Mayor, Township Comr., Planning Bd.* (1984, CA3 NJ) 743 F2d 159, 1985 AMC 1896.

Nothing in Clean Water Act (33 USCS §§ 1251 et seq.) presages congressional intent to occupy entire field of water pollution to exclusion of state regulation. *Stoddard v Western Carolina Regional Sewer Authority* (1986, CA4 SC) 784 F2d 1200, 23 Env't Rep Cas 2105, 16 ELR 20503 (criticized in *St. John's Organic Farm v Gem County Mosquito Abatement Dist.* (2009, CA9 Idaho) 2009 US App LEXIS 17568).

When state's water quality standards were read in conjunction with guidance set forth in Fla. Stat. § 403.021(11), waterbodies not meeting water quality standards solely because of natural conditions did not need to be placed on state's impaired waters list, thus, such argument by plaintiff environmental groups challenging defendant EPA's approval of state's impaired waterbodies list was rejected; phrase "restore and maintain," as used in 33 USCS § 1251, indicated that Congress sought to return waterbodies to their natural conditions, not modify waterbodies' natural conditions. *Sierra Club, Inc. v Leavitt* (2007, CA11 Fla) 488 F3d 904, 64 Env't Rep Cas 1705, 67 FR Serv 3d 1332, 37 ELR 20138, 20 FLW Fed C 689.

Federal Water Pollution Control Act (33 USCS §§ 1151 et seq.) as amended in 1972 (33 USCS §§ 1251 et seq.) did not preempt state of Illinois from seeking abatement in Federal District Court of federal common law nuisance in interstate or navigable waters. *Illinois ex rel. Scott v Milwaukee* (1973, ND Ill) 366 F Supp 298, 5 Evt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

State law claims against out-of-state dischargers are pre-empted by comprehensive federal statute (33 USCS §§ 1251 et seq.) which in turn pre-empts federal common law because uniformity in interstate regulation of pollution is concern of same magnitude whatever form federal response may take. *Chicago Park Dist. v Sanitary Dist. of Hammond* (1981, ND Ill) 530 F Supp 291, 18 Evt Rep Cas 1372, 13 ELR 20372.

Challenge to EPA's veto of water storage project must fail, where, inter alia, water entities argue that EPA violated 33 USCS § 1251(g), prohibiting interference with state laws allocating quantities of water, because entities do not have standing to protect city's water rights, and EPA has done nothing to prevent city or any other water rights owners from using or transferring their rights. *Alameda Water & Sanitation Dist. v Reilly* (1996, DC Colo) 930 F Supp 486, 43 Evt Rep Cas 1471, 26 ELR 21526.

Taxpayers' challenge to property taxes imposed to fund comprehensive scheme of sewer improvements intended to bring defendant municipalities into compliance with Clean Water Act (33 USCS §§ 1251 et seq.) must fail, where taxes are pursuant to consent decree issued by federal District Court, because court may order local government unit with taxing authority to levy taxes adequate to satisfy municipality's debt obligations incurred in complying with federal law, even if taxes exceed state constitutional and statutory limitations. *Bylinski v City of Allen Park* (1998, ED Mich) 8 F Supp 2d 965, affd (1999, CA6 Mich) 169 F3d 1001, cert den (1999) 527 US 1037, 119 S Ct 2396, 144 L Ed 2d 796 and (criticized in *Henson v Ciba-Geigy Corp.* (2001, CA11 Fla) 261 F3d 1065, 14 FLW Fed C 1094) and (ovrld in part by *Syngenta Crop Prot., Inc. v Henson* (2002) 537 US 28, 123 S Ct 366, 154 L Ed 2d 368, 2002 CDOS 10936, 2002 Daily Journal DAR 12654, 16 FLW Fed S 4) and (Overruled as stated in *City of Warren v City of Detroit* (2007, CA6 Mich) 495 F3d 282, 2007 FED App 276P).

County's state-law nuisance and related pollution claims against city, relating to city's operation of dam, were not preempted by 33 USCS § 1251(b), as basis for removal jurisdiction, in light of intrastate nature of dispute and Clean Water Act's savings clause. *Portage County Bd. of Comm'rs v City of Akron* (1998, ND Ohio) 12 F Supp 2d 693.

Under Clean Water Act, 33 USCS §§ 1251 et seq., all federal agencies must comply with state water quality standards; district court denied state's motion for preliminary injunction to stop Army Corps of Engineers from proceeding on project because of lack of possibility of success on merits. *North Dakota v United States Army Corps of Eng'rs* (2003, DC ND) 270 F Supp 2d 1115, injunction den (2003, DC ND) 2003 US Dist LEXIS 12072.

Lessor was entitled to summary judgment on his liquidated damages claim in action arising from early termination of lease; performance was not excused based on frustration of purpose because increased costs associated with dairy farm operator's compliance with Clean Water Act, 33 USCS §§ 1251 et seq., did not constitute substantial or severe frustration of purpose of lease. Further, event causing frustration was foreseeable to parties at time they entered lease because obligation to comply with environmental standards was stated and known obligation. *Lindner v Meadow Gold Dairies, Inc.* (2007, DC Hawaii) 515 F Supp 2d 1154.

Florida could not be allowed to create blanket variance from phosphorus criteria for discharge into Everglades, pursuant to Fla. Stat. § 373.4592(4)(e)(2), through guise of compliance schedule set forth in administrative orders without following procedures required under Clean Water Act, 33 USCS §§ 1251 et seq. *Miccosukee Tribe of Indians v United States* (2010, SD Fla) 706 F Supp 2d 1296, 40 ELR 20122.

### 11.--More stringent standards

Since Administrator is required by FWPCA (33 USCS §§ 1251 et seq.) to include in permit more stringent state limitations, including those necessary to meet state water quality standards, and is given no authority to set aside or modify those limitations in permit proceeding, he has no authority to consider challenges to validity of state water quality standards in permanent proceeding, nor to consider whether limitations adopted by state were necessary to achieve its water quality standards. *United States Steel Corp. v Train* (1977, CA7 Ill) 556 F2d 822, 10 Evt Rep Cas 1001, 7 ELR 20419.

In the area of interstate water pollution Federal Water Pollution Control Act precludes application of one state's common or statutory law to determine liability and afford remedy for discharges, in particular by municipality, within

another state. *Illinois v Milwaukee* (1984, CA7 Ill) 731 F2d 403, 20 *Env't Rep Cas* 1801, 14 *ELR* 20359, cert den (1985) 469 *US* 1196, 83 *L Ed 2d* 981, 105 *S Ct* 979, 105 *S Ct* 980, 22 *Env't Rep Cas* 1071.

Provisions of 33 *USCS* §§ 1251(b), 1365(e), and 1370 show continuing intention of Congress not only to perpetuate rights of municipalities to adopt and enforce requirements to abate pollution more stringent than any which may be adopted under federal system but also to make certain that this activity by states and municipalities continues for public benefit; action by municipal corporation to abate pollution activities of manufacturing corporation, brought under authority of state statute and under common law, need not be stayed during pendency of proceedings under Federal Water Pollution Control Act Amendments of 1972, although objective of both local and federal jurisdictions is identical, but where method and manner of reaching objective are entirely different, in that federal agency hearings are concerned with permit expressly approving and validating continued pollution by corporation, while local proceedings involve termination of said pollution. *Metropolitan Sanitary Dist. v United States Steel Corp.* (1975, 1st Dist) 30 *Ill App 3d* 360, 332 *NE2d* 426, cert den (1976) 424 *US* 976, 47 *L Ed 2d* 746, 96 *S Ct* 1482.

## 12. Effect on existing remedies

Equitable relief against corporate defendants causing oil spills in Lake Champlain was not precluded by Federal Water Pollution, Prevention and Control Act. *United States v Ira S. Bushey & Sons, Inc.* (1973, DC Vt) 363 *F Supp* 110, 5 *Env't Rep Cas* 1710, 4 *ELR* 20071, affd without op (1973, CA2 Vt) 487 *F2d* 1393, cert den (1974) 417 *US* 976, 41 *L Ed 2d* 1146, 94 *S Ct* 3182.

1972 Amendments of Federal Water Pollution Control Act clearly shows that Congress in no way intended to destroy any remedies available to state prior to passage of 1972 Amendments; purpose of Federal Water Pollution Control Act (33 *USCS* §§ 1151 et seq.) and its 1972 Amendments (33 *USCS* §§ 1251 et seq.) was not to preempt but to supplement and amplify any preexisting remedies. *Illinois ex rel. Scott v Milwaukee* (1973, ND Ill) 366 *F Supp* 298, 5 *Env't Rep Cas* 2018, 4 *ELR* 20045, injunction gr (1973, ND Ill) 1973 *US Dist LEXIS* 15607.

Mandamus is not available when alternative adequate remedy exists, and property owners' attempt to invoke federal mandamus jurisdiction, under 28 *USCS* § 1361, to compel Environmental Protection Agency, and Army Corps of Engineers to determine if land filling operation, performed without their approval, were proper, would fail where plaintiffs had alternative adequate remedy in action under "citizen suits" provision of Federal Water Pollution Control Act Amendments of 1972 (33 *USCS* §§ 1251 et seq.). *Loveladies Property Owners Asso. v Raab* (1975, DC NJ) 430 *F Supp* 276, 10 *Env't Rep Cas* 1242, affd (1976, CA3 NJ) 547 *F2d* 1162, cert den (1977) 432 *US* 906, 53 *L Ed 2d* 1077, 97 *S Ct* 2949, 10 *Env't Rep Cas* 1249.

Federal Water Pollution Control Act (33 *USCS* §§ 1251 et seq.) and regulations promulgated thereunder in no way entitle parties outside city limits who have had easement taken upon their property for sewer project to obtain connection and access to city sewer system. Application of Easement by City for Construction of Wastewater Treatment Plant, USEPA RCO (Region 10) December 3, 1974.

## II.SCOPE OF CHAPTER 13. Persons subject to regulation

Federal dischargers of water pollutants are to be governed only by same general effluent limitations and other standards and compliance schedules as other polluters, which standards are embodied in permits issued by Environmental Protection Agency; in issuing permits to federal dischargers Agency is to treat them, under its program adopted pursuant to the National Pollutant Discharge Elimination System (33 *USCS* § 1342), in same way state would treat nonfederal dischargers under its program. *EPA v California* (1976) 426 *US* 200, 96 *S Ct* 2022, 48 *L Ed 2d* 578, 8 *Env't Rep Cas* 2089, 6 *ELR* 20563 (superseded by statute as stated in *United States v Pennsylvania Environmental Hearing Bd.* (1978, CA3 Pa) 584 *F2d* 1273, 8 *ELR* 20689) and (superseded by statute as stated in *United States v Puerto Rico* (1983, CA1 Puerto Rico) 721 *F2d* 832, 20 *Env't Rep Cas* 1189, 14 *ELR* 20003) and (superseded by statute as stated in *Parola v Weinberger* (1988, CA9 Cal) 848 *F2d* 956, 27 *Env't Rep Cas* 2081, 34 *CCFP* 75501, 18 *ELR* 20882) and (superseded by statute as stated in *United States v Air Pollution Control Bd. of Tennessee Dep't of Health & Environment* (1990, MD Tenn) 31 *Env't Rep Cas* 1492) and (superseded by statute as stated in *Ohio v United States Dep't of Energy* (1990, CA6 Ohio) 904 *F2d* 1058, 31 *Env't Rep Cas* 1448, 20 *ELR* 20953) and (superseded by statute as stated in *Sierra Club v Lujan* (1991, CA10 Colo) 931 *F2d* 1421, 33 *Env't Rep Cas* 1014, 21 *ELR* 21195).

State thruway authority was not immune from suit in federal court under 11th Amendment for suit charging violation of Clean Water Act and discharge of pollutants into bay. *Mancuso v New York State Thruway Auth.* (1996, CA2 NY) 86 *F3d* 289, 42 *Env't Rep Cas* 1961, 26 *ELR* 21418, cert den (1996) 519 *US* 992, 136 *L Ed 2d* 375, 117 *S Ct* 481, 43 *Env't Rep Cas* 1992 and (criticized in *Vogt v Bd. of Comm'rs* (2002, CA5 La) 294 *F3d* 684, 157 *OGR* 741).



33 USCS § 1251

To infer that in enacting predecessor to 33 USCS § 1251, Congress deprived states of their constitutional immunity from private suits arising from cleanup activities would frustrate Act's repeatedly articulated objective of encouraging state participation and cooperation in clean up of oil spills. *Burgess v M/V Tamano* (1974, DC Me) 382 F Supp 351.

Construction company that sought to construct and restore for use oil pipeline that traversed 149 miles was required to obtain permit under 33 USCS §§ 1251 et seq. from U.S. Army Corps of Engineers because project would involve release of sediment in or near various streams and wetlands that were part of navigable waters of *United States*. *Stop the Pipeline v White* (2002, SD Ohio) 233 F Supp 2d 957, 155 OGR 361.

Defendant, who was wastewater discharge under Clean Water Act (CWA), 33 USCS §§ 1251 et seq., and who, as electroplater/metal finisher, was significant industrial user was not "closely regulated industry" because CWA is general purpose environmental law applied to industrial companies exception to warrant requirement; therefore, publicly owned treatment works could not conduct warrantless administrative searches of defendant's manhole and sampling box under closely regulated industry exception to warrant requirement. *United States v Hajduk* (2005, DC Colo) 396 F Supp 2d 1216, 61 *Env't Rep Cas* 1750.

Fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from scope of FWPCA (33 USCS §§ 1251 et seq.); discharge of pollutants into city's nontreatment waste water system which in turn emptied into Mississippi River constituted discharge into "navigable waters" as described in "general definitions" section of FWPCA (33 USCS § 1362(7)). *United States v Velsicol Chemical Corp.* (976, WD Tenn) 438 F Supp 945, 9 *Env't Rep Cas* 1722.

#### 14.--Federal agencies

In action to enjoin Corps of Engineers from further dam construction on lower Snake River, and to compel Corps of Engineers to comply with certain federal laws, including, inter alia, predecessor to 33 USCS §§ 1251 et seq., as essence of plaintiffs' case on merits required determination of whether federal officials had exceeded their authority or had exercised that authority in void manner, such action fell within exceptions to sovereign immunity; however, if relief sought would work intolerable burden on governmental functions, outweighing any consideration of private harm, action must fail notwithstanding allegations falling within recognized exceptions to sovereign immunity. *Association of Northwest Steelheaders, etc. v United States Army Corps of Engineers* (1973, CA9 Wash) 485 F2d 67, 3 *ELR* 20807.

It was not abuse of discretion for Army Corps of Engineers to construe Clean Water Act, 33 USCS §§ 1251 et seq., and its regulations as not requiring Corps to consider any future deepening of ship channel as adverse environmental consequence of issuing dredge and fill permit to port authority. *City of Shoreacres v Waterworth* (2005, CA5 Tex) 420 F3d 440, 60 *Env't Rep Cas* 2068, 35 *ELR* 20162.

Attorney fees will not be granted for preparation of plaintiff's motion to hold Secretary of Army in contempt for failure to comply with Clean Water Act where motion for contempt was denied, defendant had remedied noncompliance prior to filing of plaintiff's motion, and where defendant had made substantial efforts to maintain compliance with decree. *Public Interest Research Group v Stone* (1994, DC NJ) 156 *FRD* 568.

#### 15. Acts covered

Environmental Protection Agency has no authority under Federal Water Pollution Control Act, as amended in 1972 (33 USCS §§ 1251 et seq.), to regulate discharge into the nation's waterways of nuclear waste materials subject to regulation by Atomic Energy Commission and its successors under Atomic Energy Act of 1954 (42 USCS §§ 2011 et seq.). *Train v Colorado Public Interest Research Group, Inc.* (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 *Env't Rep Cas* 2057, 6 *ELR* 20549.

Clean Water Act (33 USCS §§ 1251 et seq.), together with regulations promulgated under its authority, authorizes Army Corps of Engineers to require landowners to obtain permits from Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. *United States v Riverside Bayview Homes, Inc.* (1985) 474 US 121, 88 L Ed 2d 419, 106 S Ct 455, 23 *Env't Rep Cas* 1561, 16 *ELR* 20086, remanded (1986, CA6 Mich) 793 F2d 1294 and (criticized in *American Mining Congress v United States Army Corps of Eng'rs* (2000, DC Dist Col) 120 F Supp 2d 23, 51 *Env't Rep Cas* 1773).

Army Corps of Engineers acts within its authority in requiring plaintiffs, who seek nationwide permit for deposit of dredge material for construction of dam and reservoir, to proceed under individual permit procedure, where record supports finding that discharge may adversely modify critical habitat of whooping crane, and thus plaintiffs failed to meet

burden of showing that discharge would not have adverse impact. *Riverside Irrigation Dist. v Andrews* (1985, CA10 Colo) 758 F2d 508, 22 *Env't Rep Cas* 1773, 15 *ELR* 20333.

Clean Water Act (33 USCS §§ 1251 et seq.) permits blanket prohibition and other "stringent pollution restrictions" to be imposed even where discharge caused no discernible harm to environment; accordingly, Environmental Protection Agency adequately supported regulation prohibiting discharge of toxic-carrying diesel pills in relatively small volumes, despite claim by oil companies that they pose no environmental threat when discharged in relatively small volumes of mud typical of Alaskan off-shore drilling operations. *American Petroleum Inst. v United States EPA* (1988, CA5) 858 F2d 261, 28 *Env't Rep Cas* 1529, 19 *ELR* 20317, 102 *OGR* 443, reh den, en banc, clarified (1989, CA5) 864 F2d 1156, 102 *OGR* 453.

Government is not estopped from asserting claim against landowner for construction of sea wall and placement of fill because Army Corps of Engineers official misstated Corps' jurisdiction and Corps failed to follow deadlines established by its own regulations in processing landowner's permit application, since landowner could not have reasonably relied on misstatement, and timely processing was not congressionally mandated. *United States v Boccanfuso* (1989, CA2 Conn) 882 F2d 666, 30 *Env't Rep Cas* 1292, 19 *ELR* 21388.

Landowners failed to establish Clean Water Act violation as they did not show that water from wastewater treatment facility entered their property and failed to show that any water at facility contained pollutants found on their property. *Bufford v Williams* (2002, CA10 Okla) 42 *Fed Appx* 279, 55 *Env't Rep Cas* 1781.

Clean Water Act, 33 USCS §§ 1251 et seq., was intended to broadly regulate introduction of pollutants to streams and rivers, and exempting point source owners without clear exemption from Congress from requirement to obtain National Pollutant Discharge Elimination System permits for discharges occurring on their land would undermine primary objective of Act as those objectives are stated in 33 USCS § 1251(a)(1), (3), and thus, point source owners can be liable for discharge of pollutants occurring on their land, whether or not they acted in some way to cause discharge. *Sierra Club v El Paso Gold Mines* (2005, CA10 Colo) 421 F3d 1133, 61 *Env't Rep Cas* 1274, 35 *ELR* 20175, reh gr, in part, reh den, in part, corrected (2005, CA10) 2005 *US App LEXIS* 22955 and cert den, motion gr (2006) 547 *US* 1065, 126 *S Ct* 1653, 164 *L Ed 2d* 411, 62 *Env't Rep Cas* 2088.

Sources of pollution in form of discharge of sand, dirt and dredged spoil on land which, although above mean high water line, was periodically inundated with waters of Papy's Bayou, were not beyond reach of Federal Water Pollution Control Act. *United States v Holland* (1974, MD Fla) 373 *F Supp* 665, 6 *Env't Rep Cas* 1388, 4 *ELR* 20710.

EPA was not required to prepare Environmental Impact Statement in connection with issuance of NPDES permit to Hawaiian Electric Co. which permit contemplated construction of new discharge facility, notwithstanding that discharge facility arguably fell within literal statutory definition of "source," since generating plants were existing source of pollution for which discharge facility was proposed method of control and method of control could not also be source. *Mahelona v Hawaiian Electric Co.* (1976, DC Hawaii) 418 *F Supp* 1328, 9 *Env't Rep Cas* 1625, 7 *ELR* 20031.

In action alleging violations by defendants of Clean Water Act (33 USCS §§ 1251 et seq.) on ground that county sanitary district failed to comply with sludge disposal reporting requirements and that federal, state and county defendants failed to enforce said reporting requirements, no violation occurred, where county sanitary district provided information regarding sludge disposal to state and stated during course of hearing that information regarding sludge disposal would be provided to state prior to any such disposal. *Property Owners Asso. v Gorsuch* (1983, DC Md) 601 *F Supp* 220.

Environmental group's Clean Water Act (CWA), 33 USCS §§ 1251 et seq., action was dismissed because silvicultural exemption applied to defendant's logging roads because timber harvesting operations were expressly defined to be nonpoint source activity under 40 *CFR* § 122.27; therefore, 33 USCS § 1342(p)(2)(B) which required National Pollutant Discharge Elimination System (NPDES) permit for discharges associated with industrial activity did not apply; also 33 USCS § 1311 did not apply because there was no regulation of stormwater on forest roads. *Northwest Envtl. Def. Ctr. v Brown* (2007, DC Or) 476 *F Supp 2d* 1188, 65 *Env't Rep Cas* 1696.

Complaint filed by residents of island of Vieques, Puerto Rico, asserting failure to warn of safety risks associated with United States Navy's military operations on island was dismissed because court lacked subject matter jurisdiction since discretionary function exception under Federal Tort Claims Act (FTCA), 28 USCS § 2680(a), applied to their claims; further, United States Congress has specifically intended to limit private remedies for Clean Water Act, 33 USCS §§ 1251-1357, violations to its statutory remedies, which purposefully excludes claims for compensatory damages as sought by residents. *Sanchez v United States* (2010, DC Puerto Rico) 707 *F Supp 2d* 216.

## 16.--Pollutants covered

Nuclear waste materials--source material, special nuclear material, and byproduct material--are not "pollutants" within meaning of Federal Water Pollution Control Act, as amended in 1972 (33 USCS §§ 1251 et seq.), and are not within definition of term "pollutant" in § 502(6) of Act (33 USCS § 1362(6)). *Train v Colorado Public Interest Research Group, Inc.* (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 *Env't Rep Cas* 2057, 6 *ELR* 20549.

FWPCA (33 USCS §§ 1251 et seq.) prohibits only addition of any pollutant to navigable waters from point source; those constituents occurring naturally in waterways or occurring as result of other industrial discharges do not constitute addition of pollutants by plant through which they pass; effluent limitations which require industry to treat and reduce pollutants other than those added by plant process are beyond scope of EPA's authority. *Appalachian Power Co. v Train* (1976, CA4) 545 F2d 1351, 9 *Env't Rep Cas* 1033, 6 *ELR* 20732, mod (1976, CA4) 545 F2d 1351, 9 *Env't Rep Cas* 1274.

Defendant's conviction of knowingly discharging pollutant from point source into waters of United States, in violation of Clean Water Act (CWA), 33 USCS §§ 1251 et seq., was affirmed because creek's status as "water of United States" was simply jurisdictional fact and government did not need to establish defendant's knowledge of that fact; however, government provided sufficient evidence to show that not only did human sewage pollutants discharged by defendant flow into creek, but he was well aware of this fact. *United States v Cooper* (2007, CA4 Va) 482 F3d 658, 64 *Env't Rep Cas* 1321, 37 *ELR* 20073.

Final rule promulgated by EPA under Clean Water Act, which revised certain nationwide limitations on water pollutant discharges from sources in cokemaking subcategory of iron and steel industry, was not arbitrary or capricious under 5 USCS § 706 since final limitations were logical outgrowth of proposed rule. *Am. Coke & Coal Chems. Inst. v EPA* (2006, App DC) 371 US App DC 554, 452 F3d 930, 62 *Env't Rep Cas* 1717, 36 *ELR* 20137.

In action by environmental organization against salmon farm owner alleging violation of Clean Water Act, 33 USCS §§ 1251 et seq., regarding release of pollutants into water from its salmon farms, following grant of summary judgment for environmental organization and court's order that salmon farm owner not to introduce any new class of fish into its net pens due to violation of 33 USCS § 1321(b)(7), environmental organization's motion for contempt was granted and salmon farm owner was enjoined from allowing its subsidiary aquaculture farm from stocking salmon smolt in its pens where court pierced corporate veil and found that salmon farm owner controlled aquaculture company and consciously used aquaculture company to evade its responsibilities to obey court's previous order. *United States Pub. Interest Research Group v Atl. Salmon of Me., LLC* (2003, DC Me) 261 F Supp 2d 17, 56 *Env't Rep Cas* 1840.

Under Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.), Toxic Substances Control Act (15 USCS §§ 2601 et seq.), Resource Conservation and Recovery Act (42 USCS §§ 6901 et seq.), Environmental Protection Agency may regulate all radioactive pollutants except "source," "by-product," and "special" nuclear materials, as defined by Atomic Energy Act of 1954, although activities producing nonionizing radiation do not appear to be subject to any Environmental Protection Agency administered information-gathering statute. USEPA GCO 78-1.

## 17. Waters covered

Congress had constitutional authority under its interstate commerce powers to prohibit discharge of pollutants into nonnavigable tributaries of navigable streams; Congress, in adopting Federal Water Pollution Control Act Amendments of 1972, intended to control both discharges of pollutants directly into navigable waters and discharges of pollutants into nonnavigable tributaries which flow into navigable rivers. *United States v Ashland Oil & Transp. Co.* (1974, CA6 Ky) 504 F2d 1317, 7 *Env't Rep Cas* 1114, 4 *ELR* 20784, 50 *OGR* 133.

Term "navigable waters," in 33 USCS § 1251 provision stating that it is national goal that discharge of pollutants into navigable waters be eliminated by 1985, means waters of United States, including territorial seas. *Quivira Mining Co. v United States EPA* (1985, CA10) 765 F2d 126, 22 *Env't Rep Cas* 2003, 15 *ELR* 20530, cert den (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 *Env't Rep Cas* 1872 (criticized in *FD&P Enters. v United States Army Corps of Eng'rs* (2003, DC NJ) 239 F Supp 2d 509, 33 *ELR* 20140).

District court properly denied defendant's motion under *Fed. R. Civ. P. 12(b)(3)(B)* to dismiss indictment for violating Clean Water Act (CWA), 33 USCS §§ 1251-1387; district court properly determined that affected creek was navigable water within meaning of CWA and that creek did not have to be navigable-in-fact. *United States v Phillips* (2004, CA9 Mont) 356 F3d 1086, 57 *Env't Rep Cas* 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 US 980, 125 S Ct 479, 160 L Ed 2d 358.

33 USCS § 1251

Appellate court affirmed district court's finding that discharge of turbid water from Shandaken Tunnel into creek qualified as "discharge of any pollutant" under 33 USCS § 1311(a) which was defined as "any addition of any pollutant to navigable waters from any point source", 33 USCS § 1362(12), that required City of New York to obtain National Pollutant Discharge Elimination System permit because at bottom, City's arguments for reconsideration of court's holding were simply embellishments of those made in previous case and meaning of word "addition" had not changed; neither those arguments nor any intervening developments led court to conclude that its earlier holding was reached in error or should otherwise be modified. *Catskill Mts. Chapter of Trout Unlimited, Inc. v City of New York* (2006, CA2 NY) 451 F3d 77, 62 *Env't Rep Cas* 1737, 36 *ELR* 20111, cert den (2007) 549 *US* 1252, 127 *S Ct* 1373, 167 *L Ed 2d* 160, 64 *Env't Rep Cas* 1672.

District court properly found that city violated 33 USCS § 1311(a) by discharging sewage from its waste treatment plant into waters covered by CWA without first obtaining National Pollutant Discharge Elimination System permit; rock quarry pit filled with water was "water of U.S." under 33 USCS § 1362(7) because it was part of larger wetland adjacent to navigable river and because it had significant nexus to river. *N. Cal. River Watch v City of Healdsburg* (2007, CA9 Cal) 496 F3d 993, 64 *Env't Rep Cas* 2097, cert den (2008, US) 128 *S Ct* 1225, 170 *L Ed 2d* 61, 67 *Env't Rep Cas* 1032.

In enacting Federal Water Pollution Control Act, Congress saw fit to define away old navigability restriction; Congress intended to reach activities such as pollution of non-navigable mosquito canals and mangrove wetland areas; polluting canals that empty into bayou arm of Tampa Bay is clearly activity Congress sought to regulate. *United States v Holland* (1974, MD Fla) 373 *F Supp* 665, 6 *Env't Rep Cas* 1388, 4 *ELR* 20710.

Federal Water Pollution Control Amendments of 1972, prohibiting discharge of pollutants by any person unless otherwise permitted, reach all waters of United States in geographical sense in order to control pollution at its source and extend federal authority over water pollution beyond mean high tide line; by recognizing federal authority to act when offensive matter is discharged from "any point source" government is authorized to prevent entry of pollutants into navigable waters. *P. F. Z. Properties, Inc. v Train* (1975, DC Dist Col) 393 *F Supp* 1370, 7 *Env't Rep Cas* 1930.

Congress did not intend Clean Water Act (33 USCS §§ 1251 et seq.) to extend federal regulatory and enforcement authority over groundwater contamination. *Kelley on behalf of Michigan v United States* (1985, WD Mich) 618 *F Supp* 1103, 23 *Env't Rep Cas* 1494, 16 *ELR* 20080.

Environmental group's allegations that refining company has and continues to discharge pollutants into soils and ground water beneath refinery, which then make their way to navigable creek through groundwater, state claim under Clean Water Act (33 USCS §§ 1251 et seq.), because Tenth Circuit has chosen to interpret terminology of Act broadly to give full effect to Congress's declared goal and policy "to restore and maintain chemical, physical, and biological integrity of Nation's waters." *Sierra Club v Colorado Ref. Co.* (1993, DC Colo) 838 *F Supp* 1428, 38 *Env't Rep Cas* 1171, 24 *ELR* 20749, summary judgment gr, motion den, dismd (1994, DC Colo) 852 *F Supp* 1476, 38 *Env't Rep Cas* 1700, 24 *ELR* 21464, app dismd (1994, CA10 Colo) 1994 *US App LEXIS* 15183 and (criticized in *Friends of Santa Fe County v Lac Minerals* (1995, DC NM) 892 *F Supp* 1333, 26 *ELR* 20135) and (criticized in *Old Timer, Inc. v Blackhawk-Central City Sanitation Dist.* (1999, DC Colo) 51 *F Supp 2d* 1109, 49 *Env't Rep Cas* 1165).

### 18.--Arroyos

Environmental Protection Agency Administrator's determination that certain gullies or "arroyos" are waters of United States, so as to render discharge into them of pollutants from uranium mining and milling facilities subject to EPA regulation, is supported by substantial evidence, including evidence that (1) during times of intense rainfall there can be surface connection between gullies and navigable-in-fact streams, (2) gullies flow for period after time of discharge of pollutants into waters, (3) flow continues regularly through underground aquifers into navigable-in-fact streams. *Quivira Mining Co. v United States EPA* (1985, CA10) 765 *F2d* 126, 22 *Env't Rep Cas* 2003, 15 *ELR* 20530, cert den (1986) 474 *US* 1055, 88 *L Ed 2d* 769, 106 *S Ct* 791, 23 *Env't Rep Cas* 1872 (criticized in *FD&P Enters. v United States Army Corps of Eng'rs* (2003, DC NJ) 239 *F Supp 2d* 509, 33 *ELR* 20140).

Desert washes were considered navigable waters under Clean Water Act, and therefore fell under jurisdiction of *Army Corps of Engineers. Save Our Sonoran, Inc. v Flowers* (2005, CA9 Ariz) 408 *F3d* 1113.

Legal definition of "navigable waters" or "waters of the United States" within scope of 33 USCS §§ 1251 et seq. includes any waterway within United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as river or stream, tributary to river or stream, lake, reservoir,

33 USCS § 1251

bay, gulf, sea or ocean either within or adjacent to United States. *United States v Phelps Dodge Corp.* (1975, DC Ariz) 391 F Supp 1181, 7 *Env't Rep Cas* 1823, 5 *ELR* 20308.

In suit by environmental group alleging that power plant violated terms of state discharge elimination system permit, pursuant to 11 USCS § 524(a)(2), plant's bankruptcy barred any civil penalties from alleged permit violations arising prior to date of bankruptcy confirmation order. *Riverkeeper, Inc. v Mirant Lovett, LLC* (2009, SD NY) 675 F Supp 2d 337.

**19.--Wetlands**

Clean Water Act (33 USCS §§ 1251 et seq.), together with regulations promulgated under its authority, authorizes Army Corps of Engineers to require landowners to obtain permits from Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. *United States v Riverside Bayview Homes, Inc.* (1985) 474 US 121, 88 L Ed 2d 419, 106 S Ct 455, 23 *Env't Rep Cas* 1561, 16 *ELR* 20086, remanded (1986, CA6 Mich) 793 F2d 1294 and (criticized in *American Mining Congress v United States Army Corps of Eng'rs* (2000, DC Dist Col) 120 F Supp 2d 23, 51 *Env't Rep Cas* 1773).

Regulation of wetlands under Clean Water Act (33 USCS §§ 1251 et seq.) does not violate commerce clause of US Constitution; as applied to government's suit under Clean Water Act (33 USCS §§ 1251 et seq.) against owner of various alleged wetlands for dumping fill thereon, regulatory definition of wetlands as those areas that are inundated or saturated by surface or ground water at frequency and duration sufficient to support, and that under normal circumstances do support, prevalence of vegetation typically adapted to life in saturated soil conditions, is not unconstitutionally vague. *United States v Tull* (1985, CA4 Va) 769 F2d 182, 24 *Env't Rep Cas* 1495, 3 *FR Serv* 3d 1421, 15 *ELR* 21061, rev'd, remanded (1987) 481 US 412, 107 S Ct 1831, 95 L Ed 2d 365, 25 *Env't Rep Cas* 1857, 7 *FR Serv* 3d 673, 17 *ELR* 20667 (criticized in *Feltner v Columbia Pictures TV* (1998) 523 US 340, 118 S Ct 1279, 140 L Ed 2d 438, 98 CDOS 2324, 98 *Daily Journal DAR* 3175, 26 *Media L R* 1513, 46 *USPQ2d* 1161, 1998 *Colo J C A R* 1542, 11 *FLW Fed S* 417, 163 *ALR Fed* 721) and (criticized in *SEC v First Pac. Bancorp* (1998, CA9 Cal) 142 F3d 1186, 98 CDOS 3143, 98 *Daily Journal DAR* 4343, *CCH Fed Secur L Rep P* 90197) and (criticized in *State v Irving Oil Corp.* (2008) 183 *Vt* 386, 2008 *VT* 42, 955 *A2d* 1098).

Defendants, engaged in developing large shopping mall in Massachusetts, on site that contained more than 20 acres of federally protected wetlands, who were notified by Army Corps of Engineers, which administers relevant aspects of Clean Water Act, that they could not deposit dredged or fill material into wetlands without first obtaining permit from court, but, despite that, bulldozed more than 5 acres of wetlands clear of all vegetation and piled debris and deposited gravel onto wetlands, could not raise defense that their activities were protected by "head waters nationwide permits" because state of Massachusetts, where headlands were located, did not observe such permit. *United States v Marathon Dev. Corp.* (1989, CA1 Mass) 867 F2d 96, 29 *Env't Rep Cas* 1145, 19 *ELR* 20683.

Right "to use and maintain" levees on government easement presupposed occurrence of some damage and easement contract assumed that excavation was necessary to maintain levees without prior written permission. *United States v Green Acres Enters.* (1996, CA8 Mo) 86 F3d 130.

Army Corps of Engineers had jurisdiction over developer's adjacent wetlands under Clean Water Act (CWA), 33 USCS §§ 1251 et seq., because CWA did not require significant hydrological or ecological connection as necessary for Corps to have jurisdiction over adjacent wetlands to navigable waters. Furthermore, Corps' finding were not arbitrary or capricious such that court would be required to set them aside pursuant to 5 USCS § 706 and were more than sufficient to establish significant nexus between wetlands on site and flood control channels. *Baccarat Fremont Developers, LLC v United States Army Corps of Eng'rs* (2005, CA9 Cal) 425 F3d 1150, 61 *Env't Rep Cas* 1225, 35 *ELR* 20212 (criticized in *Rapanos v United States* (2006) 547 US 715, 126 S Ct 2208, 165 L Ed 2d 159, 62 *Env't Rep Cas* 1481, 19 *FLW Fed S* 275) and cert den (2007) 549 US 1206, 127 S Ct 1258, 167 L Ed 2d 75, 64 *Env't Rep Cas* 1384.

Because mere adjacency provided basis for Clean Water Act coverage only when relevant waterbody was wetland, and no other reason for CWA coverage of pond was supported by evidence or was properly before appellate court, appellate court it reversed district court's summary judgment; appellees had to establish that it was unreasonable for Environmental Protection Agency to confine wetlands to CWA's reach to non-navigable waterbodies that were adjacent to protected waters. *San Francisco Baykeeper v Cargill Salt Div.* (2007, CA9 Cal) 481 F3d 700, 64 *Env't Rep Cas* 1109, 37 *ELR* 20061.

33 USCS § 1251

Army Corps of Engineers' assertion of jurisdiction respecting residential development in wetlands was within its authority and not ultra vires. *Tabb Lakes, Ltd. v United States* (1993, CA FC) 10 F3d 796, 38 *Env't Rep Cas* 1179, 24 *ELR* 20169.

Government is entitled to preliminary injunction enjoining defendants from engaging in unauthorized fill activities at beach site, where government is likely to succeed on merits of argument that site constitutes "waters of United States," since area retains all essential characteristics of "wetlands," in that it was inundated and/or saturated by water at frequency and duration sufficient to support vegetation that typically thrives in saturated soil conditions; fact that part of area may have become wetlands because of manmade connection between site and tidal waterways is not dispositive of Corps' jurisdiction. *United States v Ciampitti* (1984, DC NJ) 583 *F Supp* 483, 20 *Env't Rep Cas* 1926.

Clean Water Act (33 USCS §§ 1251 et seq.) jurisdiction exists over North Dakota sloughs as isolated wetlands, where U.S. questions propriety of county's work on drainage ditch bisecting sloughs, because sloughs have provided habitat to migratory birds and could be used by interstate travelers for recreation. *United States v Sargent County Water Resource Dist.* (1992, DC ND) 876 *F Supp* 1081, 40 *Env't Rep Cas* 1710, 25 *ELR* 20922.

In issuing general permit authorizing discharge of dredge and fill materials associated with several activities related to oil and gas development, Army Corps of Engineers acted arbitrarily and capriciously in finding, for purposes of Clean Water Act, that cumulative effects on aquatic environment were minimal without assessing cumulative impacts to any resource other than wetlands. *Wyo. Outdoor Council v United States Army Corps of Eng'rs* (2005, DC Wyo) 351 *F Supp 2d* 1232, 59 *Env't Rep Cas* 2038, 166 *OGR* 407.

In issuing general permit authorizing discharge of dredge and fill materials associated with several activities related to oil and gas development, Army Corps of Engineers did not act arbitrarily and capriciously in its consideration of impacts to water quality, its consideration of threatened and endangered species, its analysis of impacts to wetlands, or its conclusion that impacts of permit for purposes of Clean Water Act were both similar in nature and similar in impact. *Wyo. Outdoor Council v United States Army Corps of Eng'rs* (2005, DC Wyo) 351 *F Supp 2d* 1232, 59 *Env't Rep Cas* 2038, 166 *OGR* 407.

Because Clean Water Act was enacted well before property owners acquired certain acreage and prohibits discharge of pollutants into waters of U.S., pursuant to 33 USCS §§ 1251(a), 1311(a), and because property owners were sophisticated real estate developers with actual and constructive knowledge of § 404 of Act, court found that they did not have reasonable investment-backed expectation in their ability to develop portion of acreage that was required to be maintained as wetlands in exchange for dredging and filling of other wetlands. *Norman v United States* (2004) 63 *Fed Cl* 231, 59 *Env't Rep Cas* 1921, 34 *ELR* 20157, *aff'd* (2005, CA FC) 429 *F3d* 1081, 61 *Env't Rep Cas* 1577, 35 *ELR* 20239, *cert den* (2006) 547 *US* 1147, 126 *S Ct* 2288, 164 *L Ed 2d* 813, 63 *Env't Rep Cas* 1224.

### Unpublished Opinions

Unpublished: Environmental groups' action challenging validity of permit United States Army Corp of Engineers granted to partnership pursuant to § 404 of Clean Water Act (CWA), 33 USCS § 1344, to fill 7.69 acres of wetlands and alleging violations of CWA, 33 USCS §§ 1251-1387; Administrative Procedure Act, 5 USCS §§ 500-596; National Environmental Policy Act, 42 USCS §§ 4321-4375; Rivers and Harbors Act, 33 USCS §§ 401-467n; and implementing regulations, was prudentially moot under U.S. Const. art. III as court could no longer provide groups with any meaningful relief to their alleged injuries, which were harms to their recreational and aesthetic interests that would result from filling wetlands, because all but 0.12 acres of 7.69 acres of wetlands had been filled, and construction on top of former wetlands was substantially complete; while 0.12 acres of wetlands remain unfilled, remaining parcel had been split and were adjacent to and separated by major thoroughfare, so preserving parcels would not provide any meaningful relief to groups' alleged recreational and aesthetic injuries. *Sierra Club v United States Army Corps of Eng'rs* (2008, CA3 NJ) 277 *Fed Appx* 170, 66 *Env't Rep Cas* 2054.

Unpublished: In case arising under Clean Water Act in which regional condition issued by Savannah, Georgia regional office of U.S. Army Corps of Engineers (Corps) that prohibited use of nationwide permit (NWP) 18 in tidal waters had been rescinded, case brought by environmental group and island resident was moot; regional condition that had been eliminated was original basis for lawsuit, and even if environmental group and resident could establish that Corps' decision to allow development of wetlands at issue was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law based upon existence of tidal waters, Corps only had to reissue another certificate under current NWP 18 which was free of constraints of eliminated regional condition. *Altamaha Riverkeeper v United States Army Corps of Eng'rs* (2009, CA11 Ga) 2009 *US App LEXIS* 2433.

**20. Interests protected**

Denial of Clean Water Act permit to discharge fill on plaintiff's land was taking for which plaintiffs are entitled to compensation. *Formanek v United States* (1992) 26 Cl Ct 332, 35 *Env't Rep Cas* 1406, 22 *ELR* 20893.

Government's power extends to protection of wildlife and natural resources in navigable waters, as well as to protection of navigation; waters of Vacia Talega project are "waters of United States" within meaning and intent of Federal Water Pollution Control Act. *P. F. Z. Properties, Inc. v Train* (1975, DC Dist Col) 393 *F Supp* 1370, 7 *Env't Rep Cas* 1930.

Injunction forbidding city from constructing underground sewage retention basin on proposed site is denied, where association of impacted neighbors is concerned that proposed basin will emit unpleasant odors and reduce local property values, because association lacks standing since alleged decrease in local property values is not within zone of interest protected by either Clean Water Act (33 USCS §§ 1251 et seq.) or National Environmental Policy Act (42 USCS §§ 4321 et seq.). *Association of Significantly Impacted Neighbors v Livonia* (1991, ED Mich) 765 *F Supp* 389, 34 *Env't Rep Cas* 1398.

**III. IMPLEMENTATION OF CHAPTER 21. Duty of Environmental Protection Agency to enforce chapter**

Duties imposed by 33 USCS § 1319(a)(3) on EPA Administrator are discretionary and are not mandatory; hence Environmental Protection Agency Administrator would be dismissed as defendant in citizen suit seeking, inter alia, writ of mandamus requiring him to enforce FWPCA [33 USCS §§ 1251 et seq.] as required by § 1319(a)(3) since 33 USCS § 1365(a)(2) grants jurisdiction only over citizen suits to force Administrator to perform mandatory duties. *Sierra Club v Train* (1977, CA5 Ala) 557 *F2d* 485, 10 *Env't Rep Cas* 1433, 7 *ELR* 20670.

In enacting Clean Water Act (33 USCS §§ 1251 et seq.), Congress gave Administrator of Environmental Protection Agency broad discretion to choose means by which he will carry out his responsibilities. *Cerro Copper Products Co. v Ruckelshaus* (1985, CA7) 766 *F2d* 1060, 22 *Env't Rep Cas* 2230.

District court properly granted government's motion to dismiss without prejudice action for injunctive relief, and condition that federal and state governments execute covenant not to sue for injunctive relief or civil penalties, with reservation allowing pursuit of later cost-recovery action, was not abuse of discretion, where government's decision to proceed, under Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 USCS § 9604, with immediate removal of polychlorinated biphenyls (PCB) from harbor contaminated by adjacent industrial complex and possibly sue later for removal and clean-up costs, under 42 USCS § 9607, was justified, considering delay of years of anticipated litigation over injunctive relief, under Refuse Act, 33 USCS § 407, Clean Water Act (33 USCS §§ 1251 et seq.), and CERCLA, 42 USCS § 9606, balanced against government's overwhelming interest in protecting environment from further irreparable damage to water and marine life and in protecting citizens from potential harmful effects of PCBs. *United States v Outboard Marine Corp.* (1986, CA7 Ill) 789 *F2d* 497, 24 *Env't Rep Cas* 1273, 4 *FR Serv* 3d 1213, 16 *ELR* 20708, cert den (1986) 479 *US* 961, 93 *L Ed* 2d 403, 107 *S Ct* 457, 25 *Env't Rep Cas* 1856.

Federal Water Pollution Control Act does not grant Administrator of Environmental Protection Agency discretion to enforce Act at his option; Act must be construed as mandating appropriate action by Administrator, and civil action will lie against Administrator to compel him to act in proper case. *Illinois ex rel. Scott v Hoffman* (1977, SD Ill) 425 *F Supp* 71, 11 *Env't Rep Cas* 1049, 7 *ELR* 20287 (criticized in *Amigos Bravos v EPA* (2003, CA10 NM) 324 *F3d* 1166, 56 *Env't Rep Cas* 1270, 33 *ELR* 20166) and (criticized in *Johnson County Citizen Comm. for Clean Air & Water v United States EPA* (2005, MD Tenn) 2005 *US Dist LEXIS* 33190).

Action by state municipal corporation challenging validity of state water pollution control law as it relates to federal requirement to impose system of user charges as condition of federal grant funding under 33 USCS §§ 1251 et seq., in which plaintiff intends to enact user charge system as part of its contractual obligations under 33 USCS § 1284, is dismissed as to Environmental Protection Agency, where question of whether corporation could legally enter into contract and whether contract is void ab initio is pending before state courts and resolution in that court could render federal constitutional issue moot, where only relief plaintiff requested against EPA is to enjoin EPA from withholding funds, both EPA and plaintiff agreed that EPA could properly withhold funds, and therefore no dispute between plaintiff and EPA existed upon which relief could be granted, and where unconstitutionality of state law is not directed against EPA, so that court lacks subject matter jurisdiction of claim in relation to EPA. *Metropolitan St. Louis Sewer Dist. v Ruckelshaus* (1984, ED Mo) 590 *F Supp* 385.

By naming silvicultural nonpoint sources through example, Environmental Protection Agency (EPA) acted within its authority under § 304(f)(1) of Clean Water Act (33 USCS § 1314(f)(1)), to issue guideline for identifying nature of nonpoint sources; however, since EPA determined sources were not subject to National Pollutant Discharge Elimination System program, circuit court review was not invoked. *Envtl. Prot. Info. Ctr. v Pac. Lumber Co.* (2003, ND Cal) 266 F Supp 2d 1101, 57 Env't Rep Cas 1188.

## 22. Actions by state or local governments to enforce chapter

Municipal sewage treatment authority which failed to receive funding under Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) does not have standing to bring action against state officials for violation of Act arising out of authority's failure to receive funding; authority also does not have standing to bring action under Administrative Procedure Act (5 USCS §§ 701 et seq.) against federal defendants arising out of authority's failure to receive funding under Act, in light of citizen suit provision under Water Pollution Control Act (33 USCS § 1365). *Allegheny County Sanitary Authority v United States Environmental Protection Agency (EPA)* (1984, CA3 Pa) 732 F2d 1167, 20 Env't Rep Cas 2021, 38 FR Serv 2d 1575.

Because quality of discharged water and quantity of appropriated water are governed by different laws, *Nev. Rev. Stat. §§ 445A.500, 534.050, 534.120*, and subject to different permits, it is clear that state does not regulate dewatering under its Clean Water Act authority. *Great Basin Mine Watch v Hankins* (2006, CA9 Nev) 456 F3d 955, 36 ELR 20150.

40 CFR § 123.30 did not say state program was unacceptable if not subject to same judicial review as that for federal permit challenges, and there was scant evidence of how fees would be assessed in public interest cases under *Alaska Stat. § 09.60.010(b)*, petitioner native community's challenge to respondent Environmental Protection Agency's approval of Alaska's National Pollutant Discharge Elimination System failed; it was not shown that state program would not encourage public participation in development, revision, and enforcement of any regulation as contemplated by 33 USCS § 1251(e). *Akiak Native Cmty. v United States EPA* (2010, CA9) 625 F3d 1162.

Commonwealth of Puerto Rico has requisite standing, for purposes of declaratory judgment action asserting that Puerto Rican Federal Relations Act of 1950 (48 USCS §§ 731 to 916) limits powers of Federal Government under Federal Water Pollution Control Act Amendment of 1972 (33 USCS §§ 1251 to 1376) to regulate unnavigable waters of Puerto Rico, since injury sustained to Puerto Rico's sovereignty and having to gain approval from Federal Government for dredged or fill material to be discharged into its unnavigable waters is real and immediate. *Puerto Rico v Alexander* (1977, DC Dist Col) 438 F Supp 90, 10 Env't Rep Cas 1575, 7 ELR 20751.

State agency, West Virginia Department of Environmental Protection, that had become operator by default of former mine sites that were discharging pollutants without effective National Pollutant Discharge Elimination System permit was enjoined from further discharges and required to apply for permit under Clean Water Act, 33 USCS §§ 1251 et seq. *W. Va. Highlands Conservancy, Inc. v Huffman* (2009, ND W Va) 588 F Supp 2d 678.

Although state supreme court rejected procedural claims of group of business organizations and Agency of Natural Resources, it still concluded that decision of Vermont Water Resources Board (Board) that existing stormwater discharges into five brooks located in particular county contributed to violations of Vermont Water Quality Standards and, thus, required federal discharge permits under Clean Water Act, 33 USCS §§ 1251 et seq.; Board erroneously encroached on Agency of Natural Resources' authority in assuming that discharges contributed to violations of water quality standards. *In re Stormwater NPDES Petition* (2006) 180 Vt 261, 2006 VT 91, 910 A2d 824.

## 23. Actions by private entities to enforce chapter

In action by environmentalist groups seeking injunction against particular development, plaintiffs failed to state claim for violation of Federal Water Pollution Control Act in that there was absence of evidence that development would pollute aquifer and degrade established standards of water quality or that Department of Housing and Urban Development's loan commitment contravened its duty to effectuate Federal Water Pollution Control Act. *Sierra Club v Lynn* (1974, CA5 Tex) 502 F2d 43, 7 Env't Rep Cas 1033, 4 ELR 20844, reh den (1974, CA5 Tex) 504 F2d 760 and cert den (1975) 421 US 994, 44 L Ed 2d 484, 95 S Ct 2001 and cert den (1975) 422 US 1049, 45 L Ed 2d 701, 95 S Ct 2668, reh den (1975) 423 US 884, 46 L Ed 2d 115, 96 S Ct 158.

There is no implied private right of action under Federal Water Pollution Control Act for damages against violator of FWPCA in favor of person injured by pollutant discharges. *Evansville v Kentucky Liquid Recycling* (1979, CA7 Ind) 604 F2d 1008, 13 Env't Rep Cas 1509, 9 ELR 20679, cert den (1980) 444 US 1025, 62 L Ed 2d 659, 100 S Ct 689, 13 Env't Rep Cas 2169.



## 33 USCS § 1251

Enforcement actions by state department of environmental conservation against railroad that culminated in consent orders did not preclude institution of citizen suits under section 505 of Federal Water Pollution Control Act Amendments of 1972. *Friends of Earth v Conrail* (1985, CA2 NY) 768 F2d 57, 22 *Env't Rep Cas* 2224, 15 *ELR* 20674.

Plaintiff properly brought citizen suit under 33 USCS § 1365 against mining company for alleged violations of Federal Water Pollution Control Act because plaintiff fulfilled notice and filing requirements of 33 USCS § 1319(g)(6)(B)(ii) before state instituted administrative enforcement proceedings under 33 USCS § 1342 so that bar of § 1319(g)(6)(A) was inapplicable based on purpose of Act under 33 USCS § 1251(a) and clear meaning of § 1319(g)(6)(B). *Black Warrior Riverkeeper, Inc. v Cherokee Mining, LLC* (2008, CA11 Ala) 548 F3d 986, 21 *FLW Fed C* 1253.

In citizen suit against local sewerage district under Clean Water Act, 33 USCS §§ 1251 et seq., district court did not abuse its discretion in denying motion to admit letter from Environmental Protection Agency (EPA) under *Fed. R. Evid.* 803(8), public records exception to hearsay rule, because letter was not sufficiently reliable or trustworthy to overcome rule against admission of hearsay evidence; district court had reasonable basis for excluding letter since it was apparently only repeating third party opinion and was not state opinion of EPA. *Friends of Milwaukee's Rivers v Milwaukee Metro. Sewerage Dist.* (2009, CA7 Wis) 556 F3d 603.

In citizen suit against local sewerage district under Clean Water Act, 33 USCS §§ 1251 et seq., court's dismissal of case on res judicata grounds based on settlement between State and district was affirmed because it was not clearly erroneous for district court to decline to give post-settlement evidence of sewer overflows decisive weight in its finding that State's settlement constituted diligent prosecution for purposes of res judicata. *Friends of Milwaukee's Rivers v Milwaukee Metro. Sewerage Dist.* (2009, CA7 Wis) 556 F3d 603.

State-level citizen suits are not commanded by Clean Water Act (33 USCS §§ 1251 et seq.), and administrator did not act improperly by failing to require state programs to afford them; EPA maintains that nothing in Clean Water Act or its legislative history indicates that Congress intended that states be required to provide identical rights to those Congress specified for citizens in Federal Court, and Court of Appeals will defer to agency's reading, since Congress has not directly addressed issue and agency's determination is based on permissible construction of statute. *Natural Resources Defense Council, Inc. v U.S. EPA* (1988, App DC) 859 F2d 156, 28 *Env't Rep Cas* 1401, 19 *ELR* 20016.

Plaintiffs comprised of two community groups had standing under 33 USCS § 1365(a) to sue for alleged violations of water quality standards under Federal Water Pollution Control Act Amendments of 1972 (33 USCS §§ 1251 et seq.), where plaintiffs claimed to live within environments of natural object they sought to protect. *Montgomery Environmental Coalition v Fri* (1973, DC Dist Col) 366 F Supp 261, 6 *Env't Rep Cas* 1209, 4 *ELR* 20182.

Organization which had successfully brought suit to compel Administrator of Environmental Protection Agency to implement provisions of Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) by issuing regulations concerning state planning in area of water pollution would not be permitted to intervene of right under *Rule 24(a)(2)*, *Fed Rules of Civ Proc*, in action brought by power utility company challenging regulations issued by Administrator; for purposes of adequacy of representation, once regulations were passed, assumption was that Administrator would ably defend regulations, and in absence of anything in record suggesting that Administrator could not ably defend regulations, that any interest of proposed intervenor would be adequately represented. *Commonwealth Edison Co. v Train* (1976, ND Ill) 71 FRD 391, 23 *FR Serv* 2d 1116.

33 USCS §§ 1251 et seq. do not create implied cause of action for commercial fishermen, seafood wholesalers, retailers, distributors and processors, restaurateurs, marine, boat tackle and bait shop owners or employees of such groups against defendant which violates such statutes. *Pruitt v Allied Chemical Corp.* (1981, ED Va) 523 F Supp 975, 16 *Env't Rep Cas* 2014, 12 *ELR* 20170.

Corporation owning land to be condemned for construction of water supply dam and reservoir on creek, and unincorporated conservation authority of local residents have no standing to challenge issuance of permit for construction, where plaintiffs failed to allege kind of direct harm sufficient to establish case or controversy necessary to invoke federal court jurisdiction, and alleged only generalized fear of loss of natural environment in creek area, which is shared in substantially equal measure by all members of public, and where all property acquisitions have been by voluntary purchases from affected landowners and corporation's land had not yet been condemned. *Cane Creek Conservation Authority v Orange Water & Sewer Authority* (1984, MD NC) 590 F Supp 1123, 21 *Env't Rep Cas* 1994.

Private right of action for state to enforce Clean Water Act (33 USCS §§ 1251 et seq.) would not be implied, where Congress expressly provided federal right of enforcement, under 33 USCS § 1319(d), and private right of action for citi-

zen enforcement, under 33 USCS § 1365, but apparently chose not to create right of enforcement in states. *California v Department of Navy* (1986, ND Cal) 631 F Supp 584, 24 Env't Rep Cas 1177, 16 ELR 20618, aff'd (1988, CA9 Cal) 845 F2d 222, 27 Env't Rep Cas 1569, 18 ELR 20863.

District Court will exercise jurisdiction over citizen suit seeking declaratory judgment that company violated pollution permit and injunction against further violations because citizens commenced suit before state by filing in federal court one day before service of state complaint, and abstention is not appropriate when state action was much more limited than citizen's suit and inconsistent rulings are unlikely. *Connecticut Fund for Environment, Inc. v Upjohn Co.* (1987, DC Conn) 660 F Supp 1397, 26 Env't Rep Cas 1495, 17 ELR 21137.

Environmental organizations do not have standing to seek injunctive relief to have EPA and Army Corps of Engineers assert jurisdiction over "all" wetlands that meet scientific, regulatory definition of wetland without regard to their effect on interstate commerce, where plaintiffs have no such "personal stake" in outcome of "controversy" that would distinguish them from any other individual or class of individuals as to alleged harm that would be suffered. *National Wildlife Federation v Laubscher* (1987, SD Tex) 662 F Supp 548, 26 Env't Rep Cas 1071, 17 ELR 20892.

Environmental Protection Agency (EPA)'s decision not to amend regulation regarding lumber company's discharge of pollutants marked consummation of its decision making process, despite its generalized statement to continue studying problem and EPA's call for comments reopened underlying rule for review; as environmental organization filed its complaint after final agency action occurred, challenge to regulation was timely. *Env't. Prot. Info. Ctr. v Pac. Lumber Co.* (2003, ND Cal) 266 F Supp 2d 1101, 57 Env't Rep Cas 1188.

Environmental organization's Clean Water Act (CWA), 33 USCS §§ 1251 et seq., suit was not moot because logging company's persistent representations that its operations did not require National Pollutant Discharge Elimination System permit suggested that there was likelihood that company would resume challenged activity, procurement of state general permit, without more, was not sufficient to establish that present action was moot, and if organization were to prevail imposition of civil penalties under 33 USCS § 1319 could serve as powerful deterrent. *Env't. Prot. Info. Ctr. v Pac. Lumber Co.* (2006, ND Cal) 430 F Supp 2d 996.

Court granted organizations' motion for summary judgment where: (1) EPA had yet to comply with Clean Water Act, 33 USCS §§ 1251 et seq., to extent that it had to prepare and publish antidegradation implementation policies for Puerto Rico; (2) Puerto Rico never adopted new antidegradation implementation methods consistent with P.R. Laws Ann. tit. 3, §§ 2122, 2126 and EPA regulations, and therefore any alleged approval by EPA was not valid; and (3) because EPA determined that Puerto Rico's antidegradation implementation policies were nonexistent, and therefore procedural steps fell under guidance of 33 USCS § 1313(c)(4), which required published proposed regulations. *CORALations v United States EPA* (2007, DC Puerto Rico) 477 F Supp 2d 413.

In case in which two environmental groups challenged certain pollution limits--total maximum daily loads (TMDLs)--promulgated by Environmental Protection Agency (EPA) for waters of District of Columbia as inconsistent with Clean Water Act, 33 USCS §§ 1251 et seq., and EPA moved for partial dismissal and partial remand without vacatur, EPA's erroneous conclusion that it could express TMDLs in terms of annual or seasonal pollutant limits was unquestionably material deficiency in regulation; proper remedy was to vacate challenged rules, but stay vacatur in order to permit EPA opportunity to correct deficient TMDLs. *Anacostia Riverkeeper, Inc. v Jackson* (2010, DC Dist Col) 713 F Supp 2d 50, 40 ELR 20149.

#### 24. Forum for enforcement proceedings

In light of delicate partnership between federal and state administrative agencies created by 33 USCS § 1251 et seq., court of appeals is unwilling to infer that Congress has implicitly consented to state court actions against EPA or Administrator. *Aminoil U. S. A., Inc. v California State Water Resources Control Bd.* (1982, CA9 Cal) 674 F2d 1227, 17 Env't Rep Cas 1702, 12 ELR 20594 (superseded by statute as stated in *Beeman v Olson* (1987, CA9 Cal) 828 F2d 620) and (superseded by statute as stated in *Guidry v Durkin* (1987, CA9 Cal) 834 F2d 1465, 1988 AMC 1979).

Court affirmed defendant's conviction for violating multiple provisions of Clean Water Act (CWA), 33 USCS §§ 1251-1387, and for conspiring to violate CWA after defendant, without permit, diverted water from creek to fill ponds on property that defendant was developing because district court did not err in refusing to dismiss indictment for lack of jurisdiction on ground that creek was not navigable water under CWA and in so instructing jury. *United States v Phillips* (2004, CA9 Mont) 367 F3d 846, cert den (2004, US) 160 L Ed 2d 358, 125 S Ct 479.

#### 25. Remedies

Injunctive relief should not be automatically denied to individual lake owner making claim under 33 USCS §§ 1251 et seq., because at individual's insistence claim of defendant city's violation of Clean Water Act as well as claims for injunctive relief, costs, and attorney and expert witness fees were submitted to jury without objection by defendant, since relief under Clean Water Act is equitable in nature, and injunctive relief sought under lake owner's common-law nuisance claim also sounded in equity, power to grant or deny that relief clearly resided in trial judge. *Jones v St. Clair* (1986, CA8 Mo) 804 F2d 478, 25 *Env't Rep Cas* 1330, 17 *ELR* 20250.

Plaintiff can still pursue civil penalties against defendant even though defendant no longer owns and operates source of pollution; because of important deterrent function of civil penalties under Clean Water Act, defendant cannot escape liability arising out of past violations by selling polluting facility that continues to operate. *San Francisco Baykeeper, Inc. v Tosco Corp.* (2002, CA9 Cal) 309 F3d 1153, 2002 *CDOS* 10863, 2002 *Daily Journal DAR* 12587, 55 *Env't Rep Cas* 1385, 33 *ELR* 20098, cert dismd (2003) 539 *US* 924, 156 *L Ed 2d* 147, 123 *S Ct* 2296.

Following defendant's conviction for violating Clean Water Act, 33 USCS §§ 1251-1387, district court erred in concluding that government could not be victim entitled to restitution pursuant to *USSG* § 5E1.1; site investigation costs necessary to determine extent of environmental damage and appropriate cleanup actions were recoverable. *United States v Phillips* (2004, CA9 Mont) 356 F3d 1086, 57 *Env't Rep Cas* 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 *US* 980, 125 *S Ct* 479, 160 *L Ed 2d* 358.

Following defendant's conviction for violating Clean Water Act, 33 USCS §§ 1251-1387, district court erred in failing to consider all reliable evidence of cleanup costs in its determination of whether defendant's actions caused "substantial expenditure" for cleanup pursuant to *USSG* § 2Q1.3(b)(3); district court improperly excluded related expenses under Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USCS §§ 9601-9675. *United States v Phillips* (2004, CA9 Mont) 356 F3d 1086, 57 *Env't Rep Cas* 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 *US* 980, 125 *S Ct* 479, 160 *L Ed 2d* 358.

Following defendant's conviction for violating Clean Water Act, 33 USCS §§ 1251-1387, district court erred in concluding that *USSG* § 3C1.1 required government to show more than fact that defendant attempted to influence testimony of witness. *United States v Phillips* (2004, CA9 Mont) 356 F3d 1086, 57 *Env't Rep Cas* 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 *US* 980, 125 *S Ct* 479, 160 *L Ed 2d* 358.

Following defendant's conviction for violating Clean Water Act, 33 USCS §§ 1251-1387, district court erred in conducting its *USSG* § 5K2.0 heartland analysis; district court's analysis was flawed because it considered defendant's prior state prosecution and considered internal agency memoranda and legislative history. *United States v Phillips* (2004, CA9 Mont) 356 F3d 1086, 57 *Env't Rep Cas* 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 *US* 980, 125 *S Ct* 479, 160 *L Ed 2d* 358.

Monetary damages are not available under Clean Water Act (33 USCS §§ 1251 et seq.). *Fairview Township v United States EPA* (1984, MD Pa) 593 *F Supp* 1311, 22 *Env't Rep Cas* 1423, 15 *ELR* 20028, aff'd in part and remanded in part on other grounds (1985, CA3 Pa) 773 *F2d* 517, 23 *Env't Rep Cas* 1460, 15 *ELR* 20951.

Government is entitled to preliminary injunction mandating removal of fill from beach under 33 USCS § 1251(a), where there is reasonable likelihood that filled pool is within tidal waters and thus within waters of U.S. land surrounding pool is likely "adjacent wetlands," because government is likely to succeed on merits; traditional test for preliminary injunction and purposes of Clean Water Act (USCS §§ 1251 et seq.) dictate issuance. *United States v Malibu Beach, Inc.* (1989, DC NJ) 711 *F Supp* 1301, 29 *Env't Rep Cas* 1920, 19 *ELR* 21247.

## 26. Impoundment of funds

Under 33 USCS §§ 1285 and 1287, Administrator could not allot to states less than entire amount authorized to be appropriated by 33 USCS § 1287, but instead was obligated to allot full amounts authorized for appropriations. *Train v New York* (1975) 420 *US* 35, 43 *L Ed 2d* 1, 95 *S Ct* 839, 7 *Env't Rep Cas* 1497, 5 *ELR* 20162; *Minnesota v United States Environmental Protection Agency* (1975, CA8 Minn) 512 *F2d* 913.

United States Supreme Court will vacate Federal Court of Appeals' judgment which was based on premise that under 33 USCS §§ 1285 and 1287, Administrator of Environmental Protection Agency has discretion to allot to states less than full amounts authorized to be appropriated for certain fiscal years for federal grants to municipalities for construc-

tion of publicly owned waste treatment works, and case will be remanded for reconsideration, where subsequent to Court of Appeals' decision, Supreme Court, in another case, held that Administrator has no authority to allot less than full amounts authorized to be appropriated under Federal Water Pollution Control Act. *Train v Campaign Clean Water, Inc.* (1975) 420 US 136, 43 L Ed 2d 82, 95 S Ct 847, 5 ELR 20166.

## 27. Public participation

It is doubtful that 33 USCS § 1251 public participation requirement suggests that EPA should hold some sort of public hearing before it obtains writ to sample untreated waste water. *Mobil Oil Corp. v United States EPA* (1983, CA7 Ill) 716 F2d 1187, 19 Env't Rep Cas 2043, 13 ELR 20891, cert den (1984) 466 US 980, 80 L Ed 2d 835, 104 S Ct 2363.

Environmental Appeals Board's determination that plaintiff who challenged EPA's issuance of National Pollution Discharge Elimination System permit under Clean Water Act (33 USCS §§ 1251 et seq.) failed to properly raise his concerns regarding EPA's compliance with Ocean Discharge Criteria (33 USCS § 1343) during public comment period was not supported by evidence and lacked rational basis, where plaintiff submitted statements that included references to public laws that satisfied threshold requirement by alerting EPA to his concern that EPA had not adequately complied with Ocean Discharge Criteria mandates. *Adams v United States EPA* (1994, CA1) 38 F3d 43, 25 ELR 20396.

EPA failure to include groundwater-related requirements as part of New Source Performance Standards (NSPS) under 40 C.F.R. §§ 412.40-412.47 is properly supported and does not violate 33 USCS § 1316, part of Clean Water Act, 33 USCS §§ 1251 et seq.; however, EPA has not adequately supported (1) its decision to allow Concentrated Animal Feeding Operations (CAFO) to comply with "total prohibition" requirement by designing, operating, and maintaining facility to contain runoff from 100-year, 24-hour rainfall event or (2) its decision to allow CAFOs to comply with "total prohibition" requirement through alternative performance standards; additionally, because EPA did not indicate, until adoption of final rule, that it was considering either 100-year, 24-hour rainfall event option or possibility of alternative performance standards, EPA's decision to adopt such provisions as part of NSPS for swine, poultry, and veal violates Act's public participation requirements; 33 USCS § 1251(e) provides that public participation in development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by EPA Administrator or any State under Act shall be provided for, encouraged, and assisted by Administrator and States. *Waterkeeper Alliance, Inc. v United States EPA* (2005, CA2) 399 F3d 486, 59 Env't Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

In light of Second Circuit's holding that terms of nutrient management plans constitute effluent limitations that should have been included in National Pollutant Discharge Elimination System (NPDES) permits, Concentrated Animal Feeding Operation Rule (CAFO Rule), codified at 40 C.F.R. pts. 9, 122, 123, 412, deprives public of its right under 33 USCS § 1251(e) to assist in development, revision, and enforcement of effluent limitation; more specifically and in contravention of 33 USCS §§ 1342(a), 1342(b)(3), CAFO Rule prevents public from calling for hearing about--and then meaningfully commenting on--NPDES permits before they issue; CAFO Rule also impermissibly compromises public's ability to bring citizen-suits under 33 USCS § 1365(a), proven enforcement tool that Congress intended to be used to both spur and supplement government enforcement actions; under CAFO Rule, as written, citizens would be limited to enforcing mere requirement to develop nutrient management plan, but would be without means to enforce terms of nutrient management plans because they lack access to those terms. *Waterkeeper Alliance, Inc. v United States EPA* (2005, CA2) 399 F3d 486, 59 Env't Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

"Plans" and "programs" within meaning of Clean Water Act's public participation provisions (33 USCS § 1251) do not include EPA investigatory activities of sort envisaged by modifications to agreement settling litigation. *Environmental Defense Fund, Inc. v Costle* (1980, App DC) 205 US App DC 101, 636 F2d 1229, 14 Env't Rep Cas 2161, 10 ELR 20803.

EPA regulations, as interpreted by agency, provide meaningful and adequate opportunity for public participation consistent with mandate of Clean Water Act, where agency indicated that one option called for state intervention rights similar to those accorded by federal rules, and asserted that second option, to extent it was based on state's agreement not to oppose permissive intervention, will not be available in states that do not provide some means of intervention. *Natural Resources Defense Council, Inc. v U.S. EPA* (1988, App DC) 859 F2d 156, 28 Env't Rep Cas 1401, 19 ELR 20016.

In suit by environmental group alleging that power plant violated terms of state discharge elimination system permit, where by its terms, consent order did not modify permit, even assuming that consent order had modified permit, it

did not bar suit because any such modification was not product of public notice and participation requirements of under Clean Water Act, 33 USCS § 1251(e). *Riverkeeper, Inc. v Mirant Lovett, LLC* (2009, SD NY) 675 F Supp 2d 337.

#### 28. Miscellaneous

Environmental organization's allegations that lumber company used myriad of unpermitted culverts, drainage ditches, and other "point source"-like conduits to discharge stormwater and pollutants was sufficient to state claim under CWA, 33 USCS §§ 1251 et seq. *Envtl. Prot. Info. Ctr. v Pac. Lumber Co.* (2004, ND Cal) 301 F Supp 2d 1102, 58 *Envl Rep Cas* 1523 (criticized in *Conservation Law Found. v Hannaford Bros. Co.* (2004, DC Vt) 327 F Supp 2d 325).

U.S. Forest Service and Bureau of Land Management did not act arbitrarily or capriciously in allowing expansion of phosphate mine, because, inter alia, (1) they properly approved cover design without additional modeling under Clean Water Act, 33 USCS §§ 1251-1376, since they had abundant information on which to base reasoned scientific decision that cover would perform as modeled, and (2) no certification was required under 33 USCS § 1341 since there was no direct hydrological connection between ground water and surface water. *Greater Yellowstone Coalition v Larson* (2009, DC Idaho) 641 F Supp 2d 1120.

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\*\*\* CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
STANDARDS AND ENFORCEMENT

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*33 USCS § 1313*

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards.

(1) In order to carry out the purpose of this Act [33 USCS §§ 1251 et seq.], any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act [33 USCS §§ 1251 et seq.] unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972] has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments



of 1972 [enacted Oct. 18, 1972], he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations.

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33 USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act [33 USCS § 1317(a)(1)] for which criteria have been published under section 304(a) [33 USCS § 1314(a)], the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8) [33 USCS § 1314(a)(8)]. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act [33 USCS §§ 1251 et seq.], such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act [33 USCS §§ 1251 et seq.].

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The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act [33 USCS §§ 1251 et seq.].

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process.

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.].

(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 [enacted Oct. 18, 1972] to the Administrator for his approval a proposed continuing planning process which is consistent with this Act [33 USCS §§ 1251 et seq.]. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act [33 USCS §§ 1251 et seq.]. The Administrator shall not approve any State permit program under title IV of this Act [33 USCS §§ 1341 et seq.] for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) [33 USCS § 1311(b)(1), (2)] nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act [33 USCS § 1326].

(h) Thermal water quality standards. For the purposes of this Act [33 USCS §§ 1251 et seq.] the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria.

(1) Adoption by States.

(A) Initial criteria and standards. Not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000], each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a) [33 USCS § 1314(a)].

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 304(a)(9) [33 USCS § 1314(a)(9)], each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt.

(A) In general. If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000].

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(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

**HISTORY:**

(June 30, 1948, ch 758, Title III, § 303, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 846; Feb. 4, 1987, P.L. 100-4, Title III, § 308(d), Title IV, § 404(b), 101 Stat. 39, 68; Oct. 10, 2000, P.L. 106-284, § 2, 114 Stat. 870.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

References in text:

"This Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972", referred to in this section, is Act June 30, 1948, ch 758 (former 33 USCS §§ 1151 et seq.), prior to supersedure and reenactment by Act Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 816.

Amendments:

1987. Act Feb. 4, 1987, in subsec. (c)(2), inserted "(A)" following "(2)", and added subpara. (B); and in subsec. (d), added para. (4).

2000. Act Oct. 10, 2000, added subsec. (i).

**NOTES:**

Code of Federal Regulations:

Environmental Protection Agency--OMB approvals under the Paperwork Reduction Act, 40 CFR 9.1 et seq.

Environmental Protection Agency--Concentrated aquatic animal production point source category, 40 CFR 451.1 et seq.

Related Statutes & Rules:

Definition of "point source", 33 USCS § 1362.

This section is referred to in 16 USCS § 1455b; 33 USCS §§ 1252, 1284, 1285, 1288, 1311, 1313a, 1314, 1319, 1326, 1329, 1341, 1342, 1362, 1375, 1377, 1383, 1384; 42 USCS § 9621.

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11A Fed Proc L Ed, Environmental Protection §§ 32:758, 759, 873.

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61C Am Jur 2d, Pollution Control §§ 680-682, 744, 803, 806.

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6 Environmental Law Practice Guide (Matthew Bender), ch 56, Indiana § 56.27.

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#### Interpretive Notes and Decisions:

1. Generally 2. Relationship with other laws 3. Effect of state standards 4.--Burden of proof 5. Judicial review 6.--Ripeness 7. Agency review 8. Review by state 9. Actions by private parties

#### 1. Generally

For purposes of 33 USCS § 1313, all waters within state are interrelated; thus, it would be contrary to congressional directive to permit individual plaintiffs or federal court to deal with only fraction of state's waters and, in effect, impose their own prioritization upon EPA by limiting scope of ordered remedy to specific streams of paramount concern to parties before court. *Alaska Ctr. for the Env't v Browner (1994, CA9 Wash) 20 F3d 981, 94 CDOS 2202, 94 Daily Journal DAR 4153, 38 Env't Rep Cas 1345, 24 ELR 20702.*

Total maximum daily load (33 USCS § 1313(d)(1)(C)) may be expressed by another measure of mass per time, where such alternative measure best serves purpose of effective regulation of pollutant levels in bodies of water. *NRDC, Inc. v Muszynski* (2001, CA2 NY) 268 F3d 91, 53 *Env't Rep Cas* 1289, 32 *ELR* 20203 (criticized in *Friends of the Earth v EPA* (2004, DC Dist Col) 346 F Supp 2d 182, 60 *Env't Rep Cas* 1073) and (criticized in *Friends of the Earth v EPA* (2006, App DC) 371 US App DC 1, 446 F3d 140, 36 *ELR* 20077).

Clean Water Act is best read to include waters impaired only by nonpoint sources of pollution in § 303(d) listing and total maximum daily loads requirements. *Pronsolino v Natri* (2002, CA9 Cal) 291 F3d 1123, 2002 *CDOS* 4733, 2002 *Daily Journal DAR* 6059, 54 *Env't Rep Cas* 1481, 32 *ELR* 20689, cert den (2003) 539 US 926, 123 S Ct 2573, 156 L Ed 2d 602, 56 *Env't Rep Cas* 1960 and (criticized in *Env'tl. Prot. Info. Ctr. v Pac. Lumber Co.* (2007, ND Cal) 469 F Supp 2d 803, 64 *Env't Rep Cas* 1880, 37 *ELR* 20012).

List required by § 303(d)(1) of Clean Water Act (33 USCS § 1313(d)(1)) must contain any waters for which particular effluent limitations will not be adequate to attain statute's water quality goals. *Pronsolino v Natri* (2002, CA9 Cal) 291 F3d 1123, 2002 *CDOS* 4733, 2002 *Daily Journal DAR* 6059, 54 *Env't Rep Cas* 1481, 32 *ELR* 20689, cert den (2003) 539 US 926, 123 S Ct 2573, 156 L Ed 2d 602, 56 *Env't Rep Cas* 1960 and (criticized in *Env'tl. Prot. Info. Ctr. v Pac. Lumber Co.* (2007, ND Cal) 469 F Supp 2d 803, 64 *Env't Rep Cas* 1880, 37 *ELR* 20012).

EPA was not required to set pollution standards for state due to its failure to establish daily loads of pollutants which could have been introduced into waters; since state submitted some daily load limits, constructive submission theory had not applied. *San Francisco Baykeeper v Whitman* (2002, CA9 Cal) 297 F3d 877, 2002 *CDOS* 6339, 2002 *Daily Journal DAR* 7956, 32 *ELR* 20772.

Congress obviously contemplated that Administrator would exercise continuing supervision over states' planning processes and therefore must have intended Administrator to have continuing power to reject those planning processes found not to be consistent with the Act; mandate of 33 USCS § 1313(e)(3) that "Administrator shall approve any continuing planning process submitted to him. . ." requires Administrator only to approve the process and is not intended to require Administrator to approve any specific site selection for specific waste treatment plant. *New Haven v Train* (1976, DC Conn) 424 F Supp 648, 9 *Env't Rep Cas* 1553, 7 *ELR* 20110.

In action under Clean Water Act, 33 USCS §§ 1251 et seq., court ordered Environmental Protection Agency to take final action within 90 days of court's order, in accordance with 33 USCS § 1313(c)(4); Congress had limited court's equitable jurisdiction. *Kansas Natural Res. Council, Inc. v Whitman* (2003, DC Kan) 255 F Supp 2d 1208, 56 *Env't Rep Cas* 1889.

Based on plain language of 33 USCS § 1313(c)(4)(A), part of Clean Water Act, and statutory scheme established by Act, EPA is under nondiscretionary duty to promptly promulgate revised standards upon state's failure to submit its own revisions within 90 days of notice of disapproval. *Northwest Env'tl. Advocates v United States EPA* (2003, DC Or) 268 F Supp 2d 1255.

## 2. Relationship with other laws

Court could not force EPA to take action under Clean Water Act regarding states failure to submit information regarding pollution of state waterways since EPA was not under any obligation to take action. *San Francisco Baykeeper v Whitman* (2002, CA9 Cal) 297 F3d 877, 2002 *CDOS* 6339, 2002 *Daily Journal DAR* 7956, 32 *ELR* 20772.

Water quality standards promulgated pursuant to 1965 Act are to constitute floor level of quality until "stiffer" effluent limitations of 1972 Act can be implemented, in view of statutory language of 33 USCS § 1313, its legislative history, its position as predecessor to 1972 Act, remedial nature of both Acts and congressional declaration of goals and policy behind 1972 Act; thus, discharge of pollutants contributing to violation of existing water quality standards is violation of 33 USCS § 1311(a) and there was jurisdiction under 33 USCS § 1365(a)(1) of action based on violations of certain water quality standards claimed to be actionable under Federal Water Pollution Control Act Amendments of 1972. *Montgomery Environmental Coalition v Fri* (1973, DC Dist Col) 366 F Supp 261, 6 *Env't Rep Cas* 1209, 4 *ELR* 20182.

U.S. Environmental Protection Agency failed to analyze effect of State of Florida's non-compliance with Clean Water Act, 33 USCS §§ 1251 et seq., and specify changes necessary for compliance, as required by 33 USCS § 1313(c)(3) and (4), when it found no need for State of Florida or U.S. Environmental Protection Agency to take any further action regarding Florida's non-compliance with water quality standards, in variance from phosphorus criteria for

*Fla. Stat. § 373.4592(4)(e)(2). Miccosukee Tribe of Indians v United States (2010, SD Fla) 706 F Supp 2d 1296, 40 ELR 20122.*

Environmental groups were entitled to summary judgment in their action challenging Tahoe Regional Planning Agency's (TRPA) amendment of its shorezone ordinance because amendments regarding piers, buoys, and other boating facilities in Lake Tahoe violated Tahoe Regional Planning Compact under *Cal. Gov't Code § 66801* and *Nev. Rev. Stat. § 277.200* and obligation to avoid degradation of Lake Tahoe as Outstanding National Resource Water under *33 USCS §§ 1311* and *1313(d)*; also, TRPA's use inappropriate baseline invalidated environmental impact statement's (EIS) analysis of air quality, water quality, and noise. *League to Save Lake Tahoe v Tahoe Reg'l Planning Agency (2010, ED Cal) 739 F Supp 2d 1260.*

It is permissible to utilize load allocation Summary generated for purposes of *33 USCS § 1313* to set discharge limitations in National Pollutant Discharge Elimination System permit or under *33 USCS § 1311*. In re *Inland Steel Co. (1975) USEPA NPDES Permit Op No. 27.*

### 3. Effect of state standards

It is not arbitrary or capricious for EPA to reject state water quality standards and to promulgate its own standards upon refusal of state to modify its standards; EPA need not consider economic factors when setting its criteria. *Mississippi Com. on Natural Resources v Costle (1980, CA5 Miss) 625 F2d 1269, 15 Env't Rep Cas 1256, 10 ELR 20931.*

If state fails over long period of time to submit proposed total maximum daily load limits, prolonged failure may amount to "constructive submission" by state of no TMDLs, and EPA may be under duty to either approve or disapprove "submission." *Scott v Hammond (1984, CA7 Ill) 741 F2d 992, 21 Env't Rep Cas 1474, 14 ELR 20631.*

California's and Environmental Protection Agency's acceptance of Forest Service "best management practices" does not supersede previously adopted state water quality standard, for purposes of *33 USCS §§ 1313* and *1323* requiring each state to implement its own water quality standards with which federal agencies must comply, since "best management practices" are merely means to achieve appropriate state plan water quality standards and adherence to them does not automatically insure that applicable standards are being met. *Northwest Indian Cemetery Protective Ass'n v Peterson (1985, CA9 Cal) 764 F2d 581, 22 Env't Rep Cas 2107, 15 ELR 20682.*

EPA acted within scope of its statutory and regulatory authority in approving state total maximum daily load (TMDL) after having established its own; neither Clean Water Act, *33 USCS § 1313(d)*, nor its implementing regulations specified or implied that EPA was barred from approving state submitted TMDL after EPA had established its own, and in fact, states were authorized to submit waters that were identified and TMDLs "from time to time," and EPA was required either to approve or disapprove TMDL upon submission by state. *City of Arcadia v United States EPA (2005, CA9 Cal) 411 F3d 1103, 60 Env't Rep Cas 1674, 35 ELR 20122.*

EPA did not violate Administrative Procedures Act or Clean Water Act (CWA) when it approved, pursuant to *33 USCS § 1313(c)(2)* and *40 CFR § 131.21(a)*, state regulation--N.M. Admin. Code tit. 20, § 6.4.12--which exempted certain nonpoint pollution sources from CWA enforcement; state regulation was ambiguous, as EPA found, and EPA could accept state agency's statement, presented in letter, interpreting state regulation to preclude enforcement of listed activities but also declared that state was measuring, and would continue to measure, such pollutants and would take them into consideration when assessing quality of surface waters of state. *Defenders of Wildlife v United States EPA (2005, CA10 NM) 415 F3d 1121, 60 Env't Rep Cas 2127, 35 ELR 20141.*

District court erred in holding that state could avoid its *33 USCS § 1313(d)(1)(A)* responsibility by claiming lack of current data, but whether defendant EPA's decision to adopt same data cutoff led to any impaired waterbodies being left off list was factual dispute for remand on plaintiff environmental groups' claim. *Sierra Club, Inc. v Leavitt (2007, CA11 Fla) 488 F3d 904, 64 Env't Rep Cas 1705, 67 FR Serv 3d 1332, 37 ELR 20138, 20 FLW Fed C 689.*

Although the organizations and its members claimed that the Environmental Protection Agency (EPA) erred by allowing Iowa to omit from its waters list under § 303(d) (*33 USCS § 1313(d)*) of the Clean Water Act, waters that were impaired but not impaired by any "pollutant," as that term was defined by *33 USCS § 1362(6)*, the court found that although § 303(d) may allow the EPA to include all impaired waters on a state's § 303(d) list, it did not require the EPA to include impaired waters where the EPA had determined the impairment was due to something other than a pollutant. *Thomas v Jackson (2009, CA8 Iowa) 581 F3d 658.*



Although the environmental organization and its members claimed that the Environmental Protection Agency (EPA) inappropriately addressed several aspects of the State of Iowa's listing methodology, the appellate court found that although Iowa's Credible Data Law, *Iowa Code § 455B.171* did not comply with § 303(d) (33 USCS § 1313(d)) of the Clean Water Act, the Iowa law did not constitute a change in water quality standards and because the EPA did not rely on the Credible Data Law when approving the § 303(d) list, the approval was permissible; moreover, the fact that the EPA ultimately agreed with Iowa's conclusions concerning the majority of waters was insufficient to meet the organization and its members' burden to show that the EPA, after requiring the state to submit the excluded data, then adopted Iowa's methodology of excluding that data from evaluation. *Thomas v Jackson (2009, CA8 Iowa) 581 F3d 658*.

Although the organization and the members contended that the Environmental Protection Agency's (EPA) partial approval of Iowa's list under § 303(d) (33 USCS § 1313(d)) of the Clean Water Act (CWA), 33 USCS §§ 1251 et seq., was arbitrary and capricious because Iowa failed to consider all relevant data and the EPA's approval of Iowa's failure to consider the data indicated that the EPA failed to consider important information when approving the § 303(d) list, Iowa provided a rationale for each water on the water report under § 305(b) (33 USCS § 1315(b)) of the CWA that it did not include on its draft § 303(d) list; moreover, the EPA's ultimate agreement with Iowa's proposed conclusion as to a particular water was insufficient, without more, to support a conclusion that the EPA failed to consider important facts or information in reaching its conclusion; therefore, whether Iowa had shown "good cause" for its determination not to include § 305(b) waters on the § 303(d) list was a question for which deference to the EPA's judgment required that the appellate court affirm the district court. *Thomas v Jackson (2009, CA8 Iowa) 581 F3d 658*.

EPA should refrain from acting until states have contemplated initial effort to update standards as they deem appropriate. *Environmental Defense Fund, Inc. v Costle (1981, App DC) 211 US App DC 313, 657 F2d 275, 16 Env't Rep Cas 1185, 11 ELR 20459*.

EPA must promulgate "total maximum daily load" water quality standards under 33 USCS § 1313(d), where state failed to submit proposal for more than decade, because failure amounts to "constructive submission" of no limits and thus EPA's mandatory duty is triggered. *Alaska Ctr. for Env't v Reilly (1991, WD Wash) 762 F Supp 1422, 32 Env't Rep Cas 2110, 21 ELR 21305*.

Environmental Protection Agency failed to act promptly in proposing and promulgating state water quality standards pursuant to 33 USCS § 1313(c), where (1) Agency took no action when state failed to conduct triennial review; (2) Agency failed to carry out its mandatory duty to approve or disapprove state's revised proposed standards; (3) Agency disapprovals, when finally issued after more than one year, came only as result of litigation; (4) state then failed to revise its standards within 90 days; and (5) Agency was required by statute to promptly propose and promulgate standards but had not done so more than one year later. *Defenders of Wildlife v Browner (1995, DC Ariz) 909 F Supp 1342*.

Under 33 USCS § 1313(d)(2), EPA's disapproval of single Total Maximum Daily Load calculation submitted by District of Columbia for pollution discharges into one of its waterways did not obligate EPA to promulgate TMDL calculation for all District's water quality limited segments. *Kingman Park Civic Ass'n v United States EPA (1999, DC Dist Col) 84 F Supp 2d 1, 30 ELR 20017*.

State's failure to promulgate and submit to EPA total maximum daily loads (TMDLs) for all water bodies in state, as required by 33 USCS § 1313(d)(2), was not "constructive submission" of inadequate TMDLs, which EPA had to approve or disapprove within 30 days, even though statutory deadline for preparing TMDLs had passed 20 years earlier, where state had submitted some TMDLs and had dedicated substantial resources to problem and demonstrated its good-faith interest in collaborating with EPA to bring state's TMDL program to completion. *NRDC, Inc. v Fox (2000, SD NY) 93 F Supp 2d 531, 30 ELR 20493, aff'd, remanded (2001, CA2 NY) 268 F3d 91, 53 Env't Rep Cas 1289, 32 ELR 20203 (criticized in *Friends of the Earth v EPA (2004, DC Dist Col) 346 F Supp 2d 182, 60 Env't Rep Cas 1073*) and (criticized in *Friends of the Earth v EPA (2006, App DC) 371 US App DC 1, 446 F3d 140, 36 ELR 20077*).*

Environmental Protection Agency was not required by 33 USCS § 1313(c)(3) to review Montana's statutory definition of "interested" persons entitled to appeal state environmental agency decisions. *American Wildlands v Browner (2000, DC Colo) 94 F Supp 2d 1150, 50 Env't Rep Cas 2039, 30 ELR 20536, aff'd (2001, CA10 Colo) 260 F3d 1192, 52 Env't Rep Cas 2033, 2001 Colo J C A R 4049, 31 ELR 20860*.

Under 33 USCS § 1313(d), fact that affected stream was on state mandated list of streams impaired by pollution did not preclude environmental agency's approval of proposed strip mining project, where agency fairly analyzed pollutants associated with project and their effect on stream's actual, as opposed to its presumed, quality. *Ohio River Valley Env'tl*.

*Coalition v. Callaghan* (2001, SD W Va) 133 F Supp 2d 442, 31 ELR 20503, remanded (2003, CA4 W Va) 66 Fed Appx 468.

Each state is required to establish its own water quality standards, and, pursuant to 40 C.F.R. §§ 131.6(a), 136.11(a)(1), 131.11(b)(1) and (b)(2), 131.6(d), 131.12, state water quality standards must contain three elements: (1) designated uses; (2) numeric or narrative water quality criteria; and (3) anti-degradation rules. *North Dakota v United States Army Corps of Eng'rs* (2003, DC ND) 270 F Supp 2d 1115, injunction den (2003, DC ND) 2003 US Dist LEXIS 12072.

Environmental Protection Agency's (EPA) approval of state procedures for prevention of degradation of state's water was arbitrary and capricious as to various aspects of state's procedures where there was not sufficient evidence in record explaining how tier 2 review, which was location-specific and required public participation, could be done at time general permit under §§ 402 or 404 of Clean Water Act, 33 USCS § 1342, 1344, was issued, rather than at time new individual discharges were proposed, and state procedures did not require adoption of criteria for toxic pollutants identified by EPA in course of granting new exceptions to tier 2 review; however, EPA's conclusion that six aspects of state's procedures satisfied minimum federal requirements, such as state's allowance for 10 percent reduction in available assimilative capacity of individual pollutant parameters from individual discharge before tier 2 review was required. *Ohio Valley Envtl. Coalition v Horinko* (2003, SD W Va) 279 F Supp 2d 732, 57 Envt Rep Cas 1639 (criticized in *Ky. Waterways Alliance v Johnson* (2006, WD Ky) 426 F Supp 2d 612).

Although calculation of basinwide total maximum daily load (TMDL) standard for water quality limited segments did not necessarily violate Clean Water Act (CWA), 33 USCS §§ 1313 et seq., where Environmental Protection Agency (EPA) admittedly approved TMDLs that might be insufficient to lead to attainment of water quality standards, specifically fecal coliform bacteria standards, for each covered segment, EPA violated CWA; further, phased calculation that was not designed to return impaired waterways to water quality standards was not in accordance with law. *Minn. Ctr. for Envtl. Advocacy v United States EPA* (2005, DC Minn) 61 Envt Rep Cas 1122.

Since river was factually found to be tributary of lake and water quality standards applied to all surface waters of state except those wholly private waters closed to all public uses and not discharging into or polluting other waters of state, underflow of rivers could legally be taken into consideration in determining whether to apply tributaries and designated uses established by state quality standards for lake. In re *City of Phoenix Arizona* (1978) USEPA NPDES Permit Op No. 70.

Express intent of state submitting 33 USCS § 1313 basin plan does not bind EPA to include such limitations in permit although EPA should give great weight to suggested limitations; if state certifies segment as water quality limited, permit must contain more stringent limitations to meet water quality standards and EPA is required to impose such more stringent limitations in permit, although EPA policy not to modify existing permits except in extraordinary circumstances continues to hold; permittee will be entitled to challenge technical basis of Phase 1 basin plan at stage of National Pollutant Discharge Elimination System permit issuance. USEPA GCO 76-15.

#### 4.--Burden of proof

State failed to comply with total maximum daily load requirement of 33 USCS § 1313(d)(1), because, in over 16 years since state's first submissions were due, it had developed only 2 total maximum daily load requirements--neither of which satisfied statutory requirements as they failed to provide daily limits for priority pollutants on identified water quality limited segments--and state's wasteload allocations were not total maximum daily load requirements as they were not daily loads, were not for identified water quality limited segments, and did not account for seasonal variations. *Sierra Club v Hankinson* (1996, ND Ga) 939 F Supp 865, 43 Envt Rep Cas 1440, 27 ELR 20280.

State proposing reservoir which would change applicable water quality standards including elimination of water supply as designated use for waters above dam, increase of unallowable level of total dissolved solvents, and increase in maximum temperature would establish less restrictive uses than those contained in existing water if its emissions are increased by proposed modification since standards have been issued for fossil-fuel steam generators. Request for Ruling Regarding Modification of Weyerhaeuser's Springfield Operations, USEPA RCO (Region 10) August 18, 1975.

State which proposed to remove water supply as designated use and to revise numerical criteria for pH, total dissolved solids, and temperature in conjunction with proposed construction of power plant must justify downgrading on basis of conditions as they exist at time of state's demonstration; it could establish less restrictive uses if it could demonstrate that application of effluent limitations for existing sources would result in substantial and widespread adverse economic and social impact, and could not justify its proposed thermal criteria revisions on basis of effects of proposed

33 USCS § 1313

point source, in accordance with regulations. Coletto Creek Water Quality Standards, USEPA RCO (Region 6) March 4, 1977.

Where state does not even attempt to demonstrate one of factors specified in regulations implementing 33 USCS § 1313, Environmental Protection Agency must reject state's downgrade and undertake rulemaking to reinstate previously-approved designated use; 40 CFR § 130.17 clearly places burden upon state to show that use is not attainable. USEPA GCO 78-6.

##### 5. Judicial review

Where mining company filed original petition with Court of Appeals based on 33 USCS § 1369(b)(1) seeking to annul Minnesota state water quality standards as arbitrary and unreasonable and asking that Court of Appeals order Administrator of Environmental Protection Agency, pursuant to 33 USCS § 1313(a), to direct Minnesota to modify its quality standards to bring them into conformity with standards of Federal Water Pollution Control Act, Court of Appeals would consider issue abandoned and would dismiss petition where petition was filed on April 13, 1973 and the company did not press issue before Court of Appeals by its briefs or in oral argument. *Reserve Mining Co. v Environmental Protection Agency* (1975, CA8 Minn) 514 F2d 492, 7 *Env't Rep Cas* 1618, 19 *FR Serv* 2d 1406, 5 *ELR* 20596, 29 *ALR Fed* 73, mod, en banc (1975, CA8) 7 *Env't Rep Cas* 1782 and mod on other grounds (1976, CA8 Minn) 529 F2d 181, 8 *Env't Rep Cas* 1511, 6 *ELR* 20432.

Court of Appeals did not have jurisdiction to review EPA action partially approving state water quality standards pursuant to 33 USCS § 1313 since such action is not mentioned as one that may be reviewed by Court of Appeals in 33 USCS § 1369(b)(1). *Bethlehem Steel Corp. v Environmental Protection Agency* (1976, CA2) 538 F2d 513, 9 *Env't Rep Cas* 1027, 6 *ELR* 20597.

Court lacks jurisdiction to review EPA's maximum daily load rates issued under 33 USCS § 1313 where § 1313 is not listed under jurisdictional statute, 33 USCS § 1369; although court sees practicality of petitioners' argument that statutory scheme may make no sense, court will not conclude that Congress meant otherwise than it specifically stated. *Longview Fibre Co. v Rasmussen* (1992, CA9) 980 F2d 1307, 92 *CDOS* 9798, 92 *Daily Journal DAR* 16391, 23 *ELR* 20454.

Court of appeals applies de novo standard of review to determine whether district court properly applied correct legal standard under Act in reviewing EPA's approval of state water quality standards. *Natural Resources Defense Council v United States EPA* (1993, CA4 Va) 16 F3d 1395, 37 *Env't Rep Cas* 1953, 24 *ELR* 20496.

EPA acted contrary to law by relying on certain unenforceable commitments; commitments made by state agency could not reasonably be construed as mere interpretations of 401 Ky. Admin. Regs. 5:030, and EPA was not entitled to rely upon them in evaluating de minimis impact of regulation on quality of state's Tier II waters. *Ky. Waterways Alliance v Johnson* (2008, CA6 Ky) 540 F3d 466, 67 *Env't Rep Cas* 1545, 38 *ELR* 20227, 2008 *FED App* 333P, reh den (2008, CA6) 2008 *US App LEXIS* 22366.

Because actions taken under 33 USCS § 1313 were not included among listed actions expressly made directly reviewable by courts of appeals under 33 USCS § 1369(b)(1), and because courts of appeals had original jurisdiction to review only those Environmental Protection Agency (EPA) actions specifically enumerated in 33 USCS § 1369(b)(1), organization's petitions for review by appellate court of EPA's establishment of total maximum daily loads under 33 USCS § 1313(d)(1)(A) were dismissed for lack of jurisdiction. *Friends of the Earth v United States EPA* (2003, App DC) 357 *US App DC* 63, 333 F3d 184, 56 *Env't Rep Cas* 1673, 33 *ELR* 20227.

Nothing in language of 33 USCS § 1313 or regulations even hints at possibility that EPA can approve total maximum seasonal or annual loads; law says daily. *Friends of the Earth v EPA* (2006, App DC) 371 *US App DC* 1, 446 F3d 140, 36 *ELR* 20077, motion dismd, moot (2006, App DC) 62 *Env't Rep Cas* 1161, dismd, as moot (2008, DC Dist Col) 2008 *US Dist LEXIS* 97721 and cert den, motion den (2007) 549 *US* 1175, 127 *S Ct* 1121, 166 *L Ed* 2d 907, 63 *Env't Rep Cas* 2024.

Since EPA's policy preference could not override plain language of Clean Water Act regarding word daily in 33 USCS § 1313(d)(1)(C), district court's decision was reversed, and case was remanded to district court with instructions to vacate EPA's approvals pursuant to 5 USCS § 706(2). *Friends of the Earth v EPA* (2006, App DC) 371 *US App DC* 1, 446 F3d 140, 36 *ELR* 20077, motion dismd, moot (2006, App DC) 62 *Env't Rep Cas* 1161, dismd, as moot (2008, DC Dist Col) 2008 *US Dist LEXIS* 97721 and cert den, motion den (2007) 549 *US* 1175, 127 *S Ct* 1121, 166 *L Ed* 2d 907, 63 *Env't Rep Cas* 2024.

Intervenor's challenge to consent decree settling lawsuit against EPA must fail, where suit challenged EPA's failure and state's failure to set total maximum daily loads (TMDLs) of pollutants for Virginia waters, and intervenor disagrees with 11-year schedule for establishment of TMDLs for several hundred enumerated waters, because consent decree is manifestly fair and in public interest as it ensures, following 2 decades of inaction, that TMDLs will at last be established for Virginia's waters. *American Canoe Ass'n v United States EPA* (1999, ED Va) 54 F Supp 2d 621, 49 Env't Rep Cas 1065, 29 ELR 21474.

Montana and EPA must adopt schedule by November 1, 2000 for development of "total maximum daily loads" (TMDLs) of pollutants for all "water quality limited segments" (WQLSs) on state's 1996 list by May 5, 2007, where EPA acted arbitrarily in failing to disapprove of state's submission of only 130 TMDLs for 900 WQLSs identified, because this remedy does not intrude upon either state's or agency's realm of discretionary decision making. *Friends of the Wild Swan, Inc. v United States EPA* (2000, DC Mo) 130 F Supp 2d 1199, amd, clarified, motion den, remanded (2000, DC Mo) 130 F Supp 2d 1204.

Injunctive remedy is not appropriate in action seeking state compliance with Clean Water Act (33 USCS §§ 1251 et seq.), where both California and EPA have been doing something about state's establishment of Total Maximum Daily Loads (TMDLs) for pollutants in various segments of state waters, because EPA has not failed to perform nondiscretionary duties under § 1313(d)(2). *San Francisco Baykeeper, Inc. v Browner* (2001, ND Cal) 147 F Supp 2d 991.

There was no evidence in record showing that Administrator reviewed state's implementation policy or made determination that state's submissions were inadequate; therefore, court lacked jurisdiction to entertain claim brought under 33 USCS § 1313(c)(4)(B), part of Clean Water Act. *Northwest Env'tl. Advocates v United States EPA* (2003, DC Or) 268 F Supp 2d 1255.

Because EPA's distinction between all mercury-impaired waters and those mercury-impaired waters that did not meet attainable water quality standards was based on state data collection and assessment methods, undertaking its own analysis where necessary, and comparing state methodology to guidance provided by EPA, court found that EPA's decisions as to these waters under 33 USCS § 1313, was not arbitrary and capricious. *Sierra Club, Inc. v Leavitt* (2005, ND Fla) 393 F Supp 2d 1263, aff'd in part and rev'd in part, remanded on other grounds (2007, CA11 Fla) 488 F3d 904, 64 Env't Rep Cas 1705, 67 FR Serv 3d 1332, 37 ELR 20138, 20 FLW Fed C 689.

Because defendant EPA had affirmatively decided that Florida's 2003 amendments to Everglades Forever Act (EFA), Fla. Stat. § 373.4592, did not comprise new or revised water quality standards, court did not have to make its own factual findings and could not proceed under Clean Water Act's, 33 USCS §§ 1251 et seq., citizen suit provision on plaintiff Indian Tribe's claims under 33 USCS § 1313(c) that mandatory review of amendments to EFA was not performed. *Micosukee Tribe of Indians v United States* (2006, SD Fla) 61 Env't Rep Cas 2091, 19 FLW Fed D 316, summary judgment gr, in part, summary judgment gr, in part, summary judgment den, in part,, remanded, claim dismissed, injunction gr (2008, SD Fla) 38 ELR 20205.

#### 6.--Ripeness

Action, brought by utility companies seeking judicial review of EPA regulations requiring policy of antidegradation of water quality to be integrated into state water quality control plans, was not ripe for judicial review where regulations did not impose any obligations on companies, rather, regulations were directed at states and required them to adopt and implement policy which may or may not result in coercive order against utilities in future; challenge to state plan adopted as required by federal regulations, which specify minimum criteria which must be included in state program, likewise was not ripe for review where state decided that new discharge source would not impair existing use of navigable waters and discharger had not demonstrated that less stringent limitations would be sufficient to protect "balanced, indigenous population of shellfish, fish and wildlife"; antidegradation regulation was merely first step in ongoing administrative process and suit could not be brought until utilities were actually ordered to comply. *Commonwealth Edison Co. v Train* (1980, CA7 Ill) 649 F2d 481, 15 Env't Rep Cas 1288, 10 ELR 20901.

#### Unpublished Opinions

Unpublished: Where further administrative action on part of California was contemplated before total maximum daily load for trash became enforceable, district court properly dismissed cities' 33 USCS § 1313(d) claims against Environmental Protection Agency because claims were not ripe. *City of Arcadia v United States EPA* (2005, CA9 Cal) 60 Env't Rep Cas 1677.

Unpublished: Dismissal of cities' claim against Environmental Protection Agency (EPA), which was characterized by cities as EPA's de facto total maximum daily load for trash procedure, for lack of subject matter jurisdiction was proper because there had not been final agency action. *City of Arcadia v United States EPA* (2005, CA9 Cal) 60 *Env't Rep Cas* 1677.

### 7. Agency review

EPA's review of state water quality standards under 33 USCS § 1313 is not limited to issue of whether state acted arbitrarily or capriciously in establishing its standards; EPA may require state to justify standards not in conformity with EPA criteria. *Mississippi Com. on Natural Resources v Costle* (1980, CA5 Miss) 625 *F2d* 1269, 15 *Env't Rep Cas* 1256, 10 *ELR* 20931.

Plaintiff environmental groups' claim that defendant EPA violated Clean Water Act (CWA) when it allegedly added to state's 2002 List eleven waters under fish consumption advisories for mercury that had been delisted from state's 1998 List was rejected because 33 USCS § 1313(d)(2) did not require EPA to develop entirely new list each time it partially disapproved state's list and nothing in CWA prohibited EPA's practice of adding waterbodies to impaired waters list already prepared by state; to require more would be impractical and waste of resources. *Sierra Club, Inc. v Leavitt* (2007, CA11 Fla) 488 *F3d* 904, 64 *Env't Rep Cas* 1705, 67 *FR Serv* 3d 1332, 37 *ELR* 20138, 20 *FLW Fed C* 689.

Phrase "for review and approval" in EPA regulation requiring state to submit results of triennial review of its water quality standards may be interpreted as requiring submission regardless of whether there are revised standards, as environmental organization would argue, or only to revised standards, as EPA contends; court will uphold agency's interpretation where it is "eminently reasonable." *National Wildlife Fed'n v Browner* (1997, App DC) 326 *US App DC* 451, 127 *F3d* 1126, 45 *Env't Rep Cas* 1577, 28 *ELR* 20197.

Two-year program is set up for EPA's review and implementation of plan for identification of water quality limited segments in state and development of total maximum daily loads for waters designated as such, where state submitted list of segments in July 1990, EPA partially approved list in September 1991, but action on remainder of list and new waters added to list in April 1992 is long overdue, because state has mandatory duty to identify segments and set loads for them, and EPA also has nondiscretionary duty to ensure timely state compliance under 33 USCS § 1313(d)(2). *Alaska Ctr. for the Env't v Reilly* (1992, WD Wash) 796 *F Supp* 1374, 35 *Env't Rep Cas* 1052, 22 *ELR* 21204, *aff'd* (1994, CA9 Wash) 20 *F3d* 981, 94 *CDOS* 2202, 94 *Daily Journal DAR* 4153, 38 *Env't Rep Cas* 1345, 24 *ELR* 20702.

EPA's review of 2 states' water quality standards with regard to dioxin was consistent with 33 USCS § 1313, where environmental groups challenged states' 1.2-parts-per-quadrillion standard as being "too loose," because it is clear that EPA thoroughly considered all relevant factors--cancer potency, bioconcentration, fish consumption, risk level, noncancer effects--and offered rational basis for each of its decisions on record. *Natural Resources Defense Council v United States EPA* (1992, ED Va) 806 *F Supp* 1263, 35 *Env't Rep Cas* 1947, 23 *ELR* 20095, *aff'd* (1993, CA4 Va) 16 *F3d* 1395, 37 *Env't Rep Cas* 1953, 24 *ELR* 20496.

EPA's review of Maryland's and Virginia's dioxin criteria, which included thorough consideration of all relevant factors and offered rational basis for each of its decisions on record, was consistent with statutory mandate of Act, since standard that Act requires is merely whether or not state standards are in range of scientific defensibility. *Natural Resources Defense Council v United States EPA* (1992, ED Va) 806 *F Supp* 1263, 35 *Env't Rep Cas* 1947, 23 *ELR* 20095, *aff'd* (1993, CA4 Va) 16 *F3d* 1395, 37 *Env't Rep Cas* 1953, 24 *ELR* 20496.

No authority supports conclusion that Environmental Protection Agency (EPA) lacks authority to approve state-submitted Total Daily Maximum Loads (TMDLs) after EPA has established its own TMDLs, nor does this conclusion logically follow from proposition that EPA is required to approve or disapprove state-submitted TMDL within 30 days of submission; claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving State Trash TMDLs because EPA had already established EPA Trash TMDLs was dismissed without leave to amend and with prejudice for failure to state claim upon which relief could be granted. *City of Arcadia v United States EPA* (2003, ND Cal) 265 *F Supp* 2d 1142, *aff'd* (2005, CA9 Cal) 411 *F3d* 1103, 60 *Env't Rep Cas* 1674, 35 *ELR* 20122.

In absence of rational basis for finding that state's one-sentence "policy" in any way identified requisite implementation methods, environmental organization's motion for summary judgment on its third claim for relief was granted and EPA was ordered to promulgate antidegradation implementation plan for state's waters. *Northwest Env't. Advocates v United States EPA* (2003, DC Or) 268 *F Supp* 2d 1255.

Without accurate time and place designations, EPA could not approve state's revised criteria and comply with Clean Water Act; therefore, EPA'S approval of designations in Oregon was arbitrary and capricious because this key component of criteria was not addressed and designated uses of salmonid rearing and bull trout rearing and spawning were not protected, *40 CFR § 131.12(a)(1)*. *Northwest Envtl. Advocates v United States EPA (2003, DC Or) 268 F Supp 2d 1255*.

Because there was no requirement that EPA actually approve or disapprove of state's priority rankings in 303(d) list under *33 USCS § 1313*, court also found that EPA met its burden for summary judgment on certain public interest groups' claim that state's low priority for mercury-impaired waters violated *Clean Water Act*. *Sierra Club, Inc. v Leavitt (2005, ND Fla) 393 F Supp 2d 1263*, affd in part and revd in part, remanded on other grounds (2007, CA11 Fla) *488 F3d 904*, *64 Envt Rep Cas 1705*, *67 FR Serv 3d 1332*, *37 ELR 20138*, *20 FLW Fed C 689*.

In action in which environmental organizations alleged that Environmental Protection Agency's (EPA) approval of *33 USCS § 1313(d)* lists was arbitrary and capricious under *5 USCS § 706(2)(A)*, part of Administrative Procedure Act, because state's pace of resolving impaired waterways was too slow and state failed to address impairments in proper order of priority, organizations failed to state claim; EPA was under no statutory duty to consider state's pace of resolving impairments or state's priority rankings before approving lists; further, because EPA's obligation under *33 USCS § 1313(e)(2)* to review state's continuing planning process document (CPP) from time to time was discretionary, court lacked subject matter jurisdiction to review claim that Agency's failure to review state's CPP was arbitrary and capricious within meaning of *5 USCS § 706(2)(A)*. *Potomac Riverkeeper, Inc. v United States EPA (2006, DC Md) 62 Envt Rep Cas 1237*.

In approving amendments to State of Montana's numeric water quality standards, United States Environmental Protection Agency had failed to comply with *33 USCS § 1313* and *40 CFR § 131* where its conclusory explanation failed to disclose grounds upon which it acted, i.e., whether Montana's final adopted electrical conductivity and sodium adsorption rate were supported by appropriate scientific and technical data. *Pennaco Energy, Inc. v United States EPA (2009, DC Wyo) 692 F Supp 2d 1297*.

#### **8. Review by state**

Construing "discharge" in accordance with its ordinary or natural meaning--when applied to water, "flowing or issuing out"--plaintiff processing plant owner's operation of dam to produce hydroelectricity could result in discharge into navigable waters, and thus, he was required to obtain state certification under § 401 of Clean Water Act, *33 USCS § 1341*; Court noted that state water quality standards adopted pursuant to § 303 of Clean Water Act, *33 USCS § 1313*, were among "other limitations" with which state could ensure compliance through *33 USCS § 1341* certification process. *S. D. Warren Co. v Me. Bd. of Envtl. Prot. (2006) 547 US 370*, *126 S Ct 1843*, *164 L Ed 2d 625*, *62 Envt Rep Cas 1257*, *19 FLW Fed S 193*, *17 ALR Fed 2d 807*.

*33 USCS § 1313* requires comprehensive reviews of applicable water standards at least every 3 years beginning with date of enactment of *33 USCS §§ 1251 et seq*. Compliance with Section 303(c)(1) of Public Law 92-500, USEPA RCO (Region 6) October 6, 1976.

#### **9. Actions by private parties**

Citizen's suit cannot be used to require EPA to perform nondiscretionary duty regarding establishment of water quality standards, or be employed to challenge substance or content of agency standards, but may be used to challenge failure to establish any standards, where state's failure to submit any standards is constructive submission that no standards are required, where if EPA disapproves of such submission, EPA has mandatory duty to set its own standards, and where failure of EPA to act on submission could ripen to constructive approval of such submission. *Scott v Hammond (1984, CA7 Ill) 741 F2d 992*, *21 Envt Rep Cas 1474*, *14 ELR 20631*.

For purposes of *33 USCS § 1313*, all waters within state are interrelated; thus, it would be contrary to congressional directive to permit individual plaintiffs or federal court to deal with only fraction of state's waters and, in effect, impose their own prioritization upon EPA by limiting scope of ordered remedy to specific streams of paramount concern to parties before court. *Alaska Ctr. for the Env't v Browner (1994, CA9 Wash) 20 F3d 981*, *94 CDOS 2202*, *94 Daily Journal DAR 4153*, *38 Envt Rep Cas 1345*, *24 ELR 20702*.

Report indicated State had completed more than 46 of the total maximum daily loads (TMDL) for waters on California's lists and demonstrated that State had established schedule for completing all TMDLs for waters on its 1998 lists within the next 12 years; thus, State was complying with terms of statute, the constructive submission theory did not

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apply, and Environmental Protection Agency did not have duty to set TMDLs. *San Francisco BayKeeper v Whitman* (2002, CA9 Cal) 287 F3d 764, 2002 CDOS 3181, 2002 Daily Journal DAR 3971, 54 *Env't Rep Cas* 1225, 32 *ELR* 20601, op withdrawn, reh den, reh, en banc, den (2002, CA9 Cal) 297 F3d 877 and substituted op (2002, CA9 Cal) 297 F3d 877, 2002 CDOS 6339, 2002 Daily Journal DAR 7956, 32 *ELR* 20772 and amd (2002, CA9 Cal) 2002 CDOS 3852.

Court does not have jurisdiction over citizen's suit brought by environmental groups under 33 USCS § 1365 to compel EPA to promulgate numerical water quality standards for South San Francisco Bay under 33 USCS § 1313(c), since such statute does not call for nondiscretionary determination by EPA Administrator. *Citizens for Better Environment v United States EPA* (1990, ND Cal) 91 Daily Journal DAR 3145, 91 Daily Journal DAR 3689, 32 *Env't Rep Cas* 1501, 21 *ELR* 20827.

EPA is not entitled to summary dismissal of citizen suit, where suit alleges that, for period of 19 months following EPA's disapproval of state's antidegradation policy, improper discharges into state's waters were allowed as EPA failed to prepare and publish proposed regulations, because 33 USCS § 1313(c)(4) requires that EPA Administrator "promptly" prepare and publish water quality standard in event state fails to adequately revise its standard. *Raymond Proffitt Found. v United States EPA* (1996, ED Pa) 930 F Supp 1088, 42 *Env't Rep Cas* 1702, 26 *ELR* 21601.

EPA must establish with Idaho within 6 months reasonable schedule for development of total maximum daily loads (TMDLs) for polluted waterbodies in state, where its 1995 order calls for TMDL process to go on until at least 2021, because (1) role of TMDLs in strategy for improving water quality nationwide confirms that they were to be developed quickly, and (2) proposed schedule makes no provision for TMDL development for full list of Idaho "water quality limited segments." *Idaho Sportsmen's Coalition v Browner* (1996, WD Wash) 951 F Supp 962, 43 *Env't Rep Cas* 1289, 27 *ELR* 20771.

Environmental organizations' citizen suit against EPA must fail, even though it is undisputed that Montana has not yet identified all "water quality limited segments" (WQLSs) in state nor has it developed all required "total maximum daily loads" (TMDLs) for pollutants under 33 USCS § 1313(a)-(c), because submission of inadequate lists of WQLSs and TMDLs by state does not trigger affirmative duty on EPA to prepare complete lists under § 1313(d). *Friends of the Wild Swan, Inc. v United States EPA* (1999, DC Mont) 130 F Supp 2d 1184, remanded (2000, DC Mo) 130 F Supp 2d 1199, amd, clarified, motion den, remanded (2000, DC Mo) 130 F Supp 2d 1204 and affd in part and revd in part, remanded (2003, CA9 Mont) 74 *Fed Appx* 718.

Challenge to EPA's promulgation of new designated uses for certain stream segments in Northern Idaho succeeds only in small part, where EPA reasonably requires aquatic life use designation under 33 USCS § 1313(c)(2)(A) unless use attainability analysis demonstrates that aquatic life uses are unattainable, because portions of rule designating South Fork of Coeur d'Alene and Canyon Creek for cold water biota uses are upheld, but same designation for Shields Gulch cannot be upheld since only data indicated there was no water in that stream segment to support aquatic life. *Idaho Mining Ass'n v EPA* (2000, DC Idaho) 90 F Supp 2d 1078, 50 *Env't Rep Cas* 2000.

Where plaintiff landowner issued his "Notice of Citizen Suit Under the Clean Water Act" to Environmental Protection Agency (EPA) administrator, State, and gas company that was operating gas well that was allegedly source of water pollutants in ephemeral stream that ran across plaintiff's land, notice contained following information (1) that standards alleged to be violated were Clean Water Act (CWA), and Wyo. Quality Standards for Surface Water, ch. 1, § 20; (2) that activity causing violation was discharge of coal bed methane process water from every well operated by gas company (and corresponding National Pollutant Discharge Elimination System permit numbers); (3) that gas company was person responsible for these violations; (4) that violations were occurring in Wildcat Creek basin in Campbell County, Wyoming; (5) that alleged violations had been occurring continuously since 1999; and (6) name, address, and telephone number of landowner as person providing notice, landowner, complied with every requirement set forth in CWA and EPA regulations for providing notice of his intent to sue to gas company; hence, because notice was provided more than 60-days before action was commenced, landowner performed all condition precedents required by 33 USCS § 1365(b)(1)(A), part of CWA, and gas company's motion to dismiss for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)* was denied. *Swartz v Beach* (2002, DC Wyo) 229 F Supp 2d 1239.

EPA never "determined that revised or new standard was necessary" for Columbia, 33 USCS § 1313(c)(4)(B), part of Clean Water Act; because condition precedent for bringing citizen suit had not been met, court lacked jurisdiction over plaintiffs' second claim for relief, and EPA's motion for summary judgment on that claim was granted. *Northwest Env'tl. Advocates v United States EPA* (2003, DC Or) 268 F Supp 2d 1255.

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In action in which environmental organizations alleged that Environmental Protection Agency (EPA) abused its discretion in violation of 5 USCS § 706(2)(A) by approving total maximum daily loads (TMDLs) for lower priority waterway impairments before higher priority impairments, EPA was entitled to summary judgment because there was rational basis for approving TMDLs and EPA considered priority in relation to adjusting schedule for completion of TMDLs; organizations' priority argument failed because it focused on time limits instead of actual priority in which TMDLs were allegedly improperly approved under 33 USCS § 1313(d)(1)(C). *Potomac Riverkeeper, Inc. v United States EPA* (2006, DC Md) 62 *Env't Rep Cas* 1237.

Court granted organizations' motion for summary judgment where: (1) EPA had yet to comply with Clean Water Act, 33 USCS §§ 1251 et seq., to extent that it had to prepare and publish antidegradation implementation policies for Puerto Rico; (2) Puerto Rico never adopted new antidegradation implementation methods consistent with P.R. Laws Ann. tit. 3, §§ 2122, 2126 and EPA regulations, and therefore any alleged approval by EPA was not valid; and (3) because EPA determined that Puerto Rico's antidegradation implementation policies were nonexistent, and therefore procedural steps fell under guidance of 33 USCS § 1313(c)(4), which required published proposed regulations. *CORALations v United States EPA* (2007, DC Puerto Rico) 477 *F Supp 2d* 413.



# Exhibit 4



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\*\*\* CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
PERMITS AND LICENSES

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*33 USCS § 1342*

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this sec-

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tion as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator de-

termines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

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(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval of major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification). Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. 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-stormwater discharges into the storm sewers; and

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

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

**HISTORY:**

(June 30, 1948, ch 758, Title IV, § 402, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 880; Dec. 27, 1977, P.L. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1577, 1591, 1599, 1600; Feb. 4, 1987, P.L. 100-4, Title IV, §§ 401-403, 404(a), (c) [(d)], 405, 101 Stat. 65-69; Oct. 31, 1992, P.L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763; July 30, 2008, P.L. 110-288, § 2, 122 Stat. 2650.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Explanatory notes:

The bracketed reference "304(i)(2)" has been inserted in this section because Act Dec. 27, 1977, P.L. 95-217, § 50, 91 Stat. 1588, redesignated former § 304(h) of Act June 30, 1948, and any references thereto, as § 304(i) of such Act June 30, 1948.

The amendment made by § 1(a)(4) of Act Dec. 21, 2000, P.L. 106-554, is based on § 112 of Title I of Division B of H.R. 5666 (114 Stat. 2763A-224), as introduced on Dec. 15, 2000, which was enacted into law by such § 1(a)(4).

Amendments:

1977. Act Dec. 27, 1977, in subsec. (b)(8), inserted "the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to"; in subsec. (d), in para. (2), inserted "Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator." and added para. (4); in subsec. (h), substituted "or where the Administrator determines pursuant to section 309(a) of this Act that a State with an approved program has not commenced appropriate enforcement action with respect to such permit," for a comma; and added subsec. (l).

1987. Act Feb. 4, 1987, in subsec. (a)(1), inserted the subpara. designators "(A)" and "(B)"; in subsec. (c), in para. (1), substituted "as to those discharges" for "as to those navigable waters", and added para. (4); in subsec. (l), inserted



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"Limitation on permit requirement." in the subsec. catchline, inserted "(1) agricultural return flows." before "The Administrator", and added para. (2); and added subsecs. (m)-(p).

1992. Act Oct. 31, 1992, in subsec. (p), in para. (1), substituted "October 1, 1994" for "October 1, 1992" and, in para. (6), substituted "October 1, 1993" for "October 1, 1992".

2000. Act Dec. 21, 2000 added subsec. (q).

2008. Act July 30, 2008, added subsec. (r).

Redesignation:

Section 404(d) of Act Feb. 4, 1987, P.L. 100-4, which amended this section, was redesignated § 404(c) of such Act by Act Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(e)(2), 109 Stat. 727.

Transfer of functions:

Enforcement functions of the Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of the transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System by Reorg. Plan No. 1 of 1979, §§ 102(a), 203(a), 44 *Fed. Reg.* 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, which appears as 5 *USCS* § 903 note. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by § 3012(b) of Act Oct. 24, 1992, P.L. 102-486 (15 *USCS* § 719e note). Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by 15 *USCS* § 720d(f).

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see 6 *USCS* §§ 468(b), 551(d), 552(d), and 557, and the Department of Homeland Security Reorganization Plan of Nov. 25, 2002, as modified, which appears as 6 *USCS* § 542 note.

Other provisions:

**Allowable delay in modifying existing approved State permit programs to conform to 1977 amendment.** Act Dec. 27, 1977, P.L. 95-217, § 54(c)(2), 91 Stat. 1591, provided that Any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made to subsec. (b)(8) of this section, should not be required to be modified before the end of the one year period beginning on Dec. 27, 1977 unless in order to make the required modification a State must amend or enact a law in which case such modification should not be required for such State before the end of the two year period beginning Dec. 27, 1977.

**Phosphate fertilizer effluent limitation.** Act Feb. 4, 1987, P.L. 100-4, Title III, § 306(c), 101 Stat. 36, provides:

"(1) Issuance of permit. As soon as possible after the date of the enactment of this Act, but not later than 180 days after such date of enactment, the Administrator shall issue permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 *USCS* § 1342(a)(1)(B)] with respect to facilities--

"(A) which were under construction on or before April 8, 1974, and

"(B) for which the Administrator is proposing to revise the applicability of the effluent limitation established under section 301(b) of such Act [33 *USCS* § 1311(b)] for phosphate subcategory of the fertilizer manufacturing point source category to exclude such facilities.

"(2) Limitations on statutory construction. Nothing in this section shall be construed--

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"(A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters,  
"(B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 USCS § 1342(a)(1)(B)], and  
"(C) to affect the authority of any State to deny or condition certification under section 401 of such Act with respect to the issuance of permits under section 402(a)(1)(B) of such Act [33 USCS § 1342(a)(1)(B)].".

**Log transfer facilities.** Act Feb. 4, 1987, P.L. 100-4, Title IV, § 407, 101 Stat. 74, provides:

"(a) Agreement. The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 USCS §§ 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

"(b) Applications and permits before October 22, 1985. Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 USCS §§ 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act [33 USCS § 1344] before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act [33 USCS § 1342]. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act [33 USCS § 1344] satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, and 1343], modifications to the existing permit under section 404 of such Act [33 USCS § 1344] to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act [33 USCS § 1342].

"(c) Log transfer facility defined. For the purposes of this section, the term 'log transfer facility' means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft."

**Stormwater permit requirements.** Act Dec. 18, 1991, P.L. 102-240, Title I, Part A, § 1068, 105 Stat. 2007 (effective on the date of enactment as provided by § 1100 of such Act, which appears as 23 USCS § 104 note), provides:

"(a) General rule. Notwithstanding the requirements of sections 402(p)(2) (B), (C), and (D) of the Federal Water Pollution Control Act [subsec. (p)(2)(B)-(D) of this section], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator') pursuant to the requirements of this section.

"(b) Permit applications.

(1) Individual applications. The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.

"(2) Group applications. With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require--

"(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and

"(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.

"(c) Municipalities with less than 100,000 population. The Administrator shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any stormwater discharge associated with an industrial activity other than an airport, powerplant, or uncontrolled sanitary landfill owned or operated by such municipality before October 1, 1992, unless such permit is required by section 402(p)(2) (A) or (E) of the Federal Water Pollution Control Act [subsec. (p)(2)(A) or (E) of this section].

"(d) Uncontrolled sanitary landfill defined. For the purposes of this section, the term 'uncontrolled sanitary landfill' means a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act [42 USCS §§ 6941 et seq.].

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"(e) Limitation on statutory construction. Nothing in this section shall be construed to affect any application or permit requirement, including any deadline, to apply for or obtain a permit for stormwater discharges subject to section 402(p)(2) (A) or (E) of the Federal Water Pollution Control Act [subsec. (p)(2)(A) or (E) of this section].

"(f) Regulations. The Administrator shall issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992."

**Definitions; discharges incidental to normal operation of vessels.** Act July 31, 2008, P.L. 110-299, §§ 1, 2, 122 Stat. 2995; July 30, 2010, P.L. 111-215, § 1, 124 Stat. 2347, provides:

"Section 1. Definitions.

"In this Act:

"(1) Administrator. The term 'Administrator' means the Administrator of the Environmental Protection Agency.

"(2) Covered vessel. The term 'covered vessel' means a vessel that is--

"(A) less than 79 feet in length; or

"(B) a fishing vessel (as defined in section 2101 of title 46, United States Code [*46 USCS § 2101*]), regardless of the length of the vessel.

"(3) Other terms. The terms 'contiguous zone', 'discharge', 'ocean', and 'State' have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (*33 U.S.C. 1362*).

"Sec. 2. Discharges incidental to normal operation of vessels.

"(a) No permit requirement. Except as provided in subsection (b), during the period beginning on the date of enactment of this Act and ending on December 18, 2013, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (*33 U.S.C. 1342*), shall not require a permit under that section for a covered vessel for--

"(1) any discharge of effluent from properly functioning marine engines;

"(2) any discharge of laundry, shower, and galley sink wastes; or

"(3) any other discharge incidental to the normal operation of a covered vessel.

"(b) Exceptions. Subsection (a) shall not apply with respect to--

"(1) rubbish, trash, garbage, or other such materials discharged overboard;

"(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when--

"(A) used as an energy or mining facility;

"(B) used as a storage facility or a seafood processing facility;

"(C) secured to a storage facility or a seafood processing facility; or

"(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

"(3) any discharge of ballast water; or

"(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge--

"(A) contributes to a violation of a water quality standard; or

"(B) poses an unacceptable risk to human health or the environment."

**NOTES:**

Code of Federal Regulations:

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Environmental Protection Agency--Consolidated rules of practice governing the administrative assessment of civil penalties and the revocation/termination or suspension of permits, *40 CFR 22.1* et seq.

Environmental Protection Agency--Secondary treatment regulation, *40 CFR 133.100* et seq.

Environmental Protection Agency--Concentrated animal feeding operations (CAFO) point source category, *40 CFR 412.1* et seq.

Environmental Protection Agency--The pulp, paper, and paperboard point source category, *40 CFR 430.00* et seq.

Environmental Protection Agency--The centralized waste treatment point source category, *40 CFR 437.1* et seq.

Environmental Protection Agency--Metal products and machinery point source category, *40 CFR 438.1* et seq.

Environmental Protection Agency--Pharmaceutical manufacturing point source category, *40 CFR 439.0* et seq.

Environmental Protection Agency--Transportation equipment cleaning point source category, *40 CFR 442.1* et seq.

Environmental Protection Agency--Waste combustors point source category, *40 CFR 444.10* et seq.

Environmental Protection Agency--Landfills point source category, *40 CFR 445.1* et seq.

Environmental Protection Agency--Construction and development point source category, *40 CFR 450.1* et seq.

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Environmental Protection Agency--Concentrated aquatic animal production point source category, *40 CFR 451.1* et seq.

Related Statutes & Rules:

Sentencing Guidelines for the United States Courts, *18 USCS Appx §§ 2Q1.2, 2Q1.3*.  
Declaration of policy that states manage grant and permit programs, *33 USCS § 1251*.  
Effluent limitations, *33 USCS § 1311*.  
Information and guidelines, *33 USCS § 1314*.  
Toxic and pretreatment effluent standards, *33 USCS § 1317*.  
Oil and hazardous substance liability, *33 USCS § 1321*.  
Administrative procedure and judicial review, *33 USCS § 1369*.  
This section is referred to in *23 USCS § 328*; *33 USCS §§ 1251, 1283, 1284, 1285, 1288, 1301, 1311, 1314, 1317, 1318, 1319, 1321, 1322, 1323, 1328, 1341, 1343, 1344, 1345, 1365, 1369, 1371, 1373, 2104, 2803*; *42 USCS §§ 6903, 6924, 6925, 6939e, 9601*.

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Federal Procedure:

*4 Administrative Law (Matthew Bender), ch 33, Administrative Adjudications § 33.01.*  
*5 Administrative Law (Matthew Bender), ch 48, Ripeness and Finality § 48.03.*  
*6 Administrative Law (Matthew Bender), ch 51, Judicial Review of Questions of Law and Facts § 51.01.*  
11 Fed Proc L Ed, Environmental Protection § 32:55.  
11A Fed Proc L Ed, Environmental Protection §§ 32:784, 788, 803, 811, 814-816, 818, 822, 828, 833, 834, 870, 874, 923, 961.

Am Jur:

*61B Am Jur 2d, Pollution Control §§ 12, 59.*  
*61C Am Jur 2d, Pollution Control §§ 709, 727, 728, 736, 740, 742, 744, 752, 759, 765-71, 773-775, 780, 782, 792, 808, 812, 814, 853, 865.*

Forms:

*2 Bender's Federal Practice Forms, Form 8(IV):3, Federal Rules of Civil Procedure.*  
9 Fed Procedural Forms L Ed, Environmental Protection (Rev ed) §§ 29:40, 41.  
14 Fed Procedural Forms L Ed, Railroads (Rev ed) § 56:84.  
18C Am Jur Pl & Pr Forms (Rev ed), Nuisances § 99.  
19C Am Jur Pl & Pr Forms (Rev ed), Pollution Control §§ 90-93.  
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Validity, construction, and application of Clean Water Act (CWA) (Federal Water Pollution Control Act) (*33 U.S.C.S. § 1251* et seq.)--Supreme Court cases. *168 L Ed 2d 813*.

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Jurisdiction of Federal Court in Action Under National Environmental Policy Act (NEPA), *42 U.S.C.A. §§ 4321 to 4347* [*42 USCS §§ 4321-4347*], as Determined by Whether Federal Defendants Have Undertaken "Major Federal Action". *53 ALR Fed 2d 489*.

What constitutes "issuing or denying" permit for discharge of pollutants within meaning of § 509(b)(1)(F) of the Federal Water Pollution Control Act (*33 USCS § 1369(b)(1)(F)*) which authorizes judicial review of such action by Administrator of Environmental Protection Agency. *67 ALR Fed 365*.

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- 1 Energy Law & Transactions (Matthew Bender), ch 3, Federal Regulation of Energy Transactions § 3.05.
- 2 Energy Law & Transactions (Matthew Bender), ch 53, Hydroelectric Power §§ 53.04, 53.05.
- 3 Energy Law & Transactions (Matthew Bender), ch 55, Coal § 55.13.
- 3 Energy Law & Transactions (Matthew Bender), ch 70, Cogeneration and Independent Power Production § 70.08.
- 5 Energy Law & Transactions (Matthew Bender), ch 120, Energy and the Environment § 120.05.
- 1 Environmental Law Practice Guide (Matthew Bender), ch 1, Environmental Impact Statements § 1.04.
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#### Interpretive Notes and Decisions:

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## II. PERMITS

33 USCS § 1342

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**I. IN GENERAL 1. Generally**

EPA under 33 USCS § 1342, and not Secretary of Army under § 1344, has authority over placement of fill material or water treatment ponds in small streams in state for disposal of waste associated with surface coal mining operations. *West Virginia Coal Ass'n v Reilly* (1991, CA4 W Va) 33 *Env't Rep Cas* 1353, 22 *ELR* 20092.

EPA's June 12, 2006, storm water discharge rule, codified at 40 *CFR* § 122.26, represents complete departure from its previous interpretation of what constitutes "contamination" under Clean Water Act (CWA), 33 USCS § 1342(l)(2); as such, Ninth Circuit concludes that EPA's inconsistent and conflicting position regarding discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended 33 USCS § 1342(l)(2), as reflected in storm water discharge rule, 40 *CFR* § 122.26, to be arbitrary and capricious one. *NRDC v United States EPA* (2008, CA9) 526 *F3d* 591, 66 *Env't Rep Cas* 1948, 38 *ELR* 20126.

Language of Federal Water Pollution Control Act makes it evident that federal program is not intended to pre-empt authority of state to issue permits for discharges into waters within a state, but rather to induce co-operation of states in establishment of program to be administered by states within certain federal guidelines with regard to uniform national standards. *State v Republic Steel Corp.* (1973) 38 *Ohio Misc* 43, 67 *Ohio Ops* 2d 232, 311 *NE2d* 911.

**2. Relationship with other laws, generally**

Environmental Protection Agency has no authority under Federal Water Pollution Control Act Amendments of 1972 (33 USCS §§ 1251 et seq.) to regulate discharge into nation's waterways of nuclear waste materials subject to regulation by Atomic Energy Commission and its successors under Atomic Energy Act of 1954 (42 USCS §§ 2011 et seq.). *Train v Colorado Public Interest Research Group, Inc.* (1976) 426 *US* 1, 48 *L Ed* 2d 434, 96 *S Ct* 1938, 8 *Env't Rep Cas* 2057, 6 *ELR* 20549.

There was no body of federal common law to which private citizen could resort in seeking injunctive relief against stream pollution by sewage treatment plant operating under permit issued in accordance with FWPCA and authorization of EPA where (1) controversy was strictly local, (2) there was no claim of vindication of rights of another state and (3) there was no allegation of any interstate effect. *Committee for Consideration of Jones Falls Sewage System v Train* (1976, CA4 Md) 539 *F2d* 1006, 9 *Env't Rep Cas* 1212, 6 *ELR* 20703 (criticized in *Connecticut v Am. Elec. Power Co.* (2009, CA2 NY) 582 *F3d* 309).

United States government's action against cranberry farmers, alleging that they had discharged pollutants into federally-regulated waters without permit in violation of § 301 and § 502 of Clean Water Act, 33 USCS §§ 1311 and 1342, was remanded so that parties had opportunity to develop their positions in district court with awareness of jurisdictional standards applied by U.S. Supreme Court in *Rapanos v. United States*, 547 *U.S.*, 126 *S. Ct.* 2208, 165 *L. Ed.* 2d 159 (2006). *United States v Johnson* (2006, CA1 Mass) 467 *F3d* 56, 63 *Env't Rep Cas* 1289, 36 *ELR* 20218, cert den (2007,



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US) 128 S Ct 375, 169 L Ed 2d 260, 66 Env't Rep Cas 1032 and (criticized in *United States v Robison* (2007, CA11 Ala) 505 F3d 1208, 65 Env't Rep Cas 1385, 21 FLW Fed C 96).

Issuance of NPDES permit by state pursuant to program structured under FWPCA does not constitute major federal action requiring preparation of EIS. *Chesapeake Bay Foundation, Inc. v Virginia State Water Control Bd.* (1978, ED Va) 453 F Supp 122, 11 Env't Rep Cas 1897, 8 ELR 20664.

Wastewaters discharged into company's holding ponds are regulated under 42 USCS § 6903(27) rather than under 33 USCS § 1342, because wastewaters are "solid waste" under § 6903(27); exclusion for point source discharges under § 6903(27) is for those wastes actually discharged, as opposed to held in pond, and thus exclusion does not apply. *United States v Allegan Metal Finishing Co.* (1988, WD Mich) 696 F Supp 275, 28 Env't Rep Cas 1581, 19 ELR 20148, app dismd without op (1989, CA6 Mich) 867 F2d 611.

Loan made to defendant sewer authority did not fall within either exception to broad exemption for federal capitalization loans from requirements of National Environmental Protection Act (NEPA); money for sewer pipeline project did not come through 33 USCS § 1281 because program was no longer in existence, and issuance of National Pollutant Discharge Elimination System permit had been delegated to state under 33 USCS § 1342, and state's decision did not fall within exception under 33 USCS § 1371(c). *Citizens Alert Regarding the Env't v United States EPA* (2003, DC Dist Col) 259 F Supp 2d 9, claim dismissed, in part, aff'd, in part (2004, App DC) 102 Fed Appx 167, motion to strike den (2004, App DC) 2004 US App LEXIS 13228.

Not all of provisions of Clean Water Act (CWA), 33 USCS §§ 1251 et seq., dropped out or were suspended upon approval of state permit program under CWA; claim that Secretary of West Virginia Department of Environmental Protection was discharging pollutants without permit retained its federal character notwithstanding state regulation of permit program; as such, Ex parte Young exception to Eleventh Amendment was applicable, and Secretary was in violation of CWA. *W. Va. Highlands Conservancy, Inc. v Huffman* (2009, SD W Va) 651 F Supp 2d 512.

Environmental Protection Agency's retention of veto power pursuant to 33 USCS § 1342 over state-issued National Pollutant Discharge Elimination System permits does not constitute federal action requiring preparation of impact statement by EPA. USEPA GCO 76-18.

State issued National Pollutant Discharge Elimination System permits under 33 USCS § 1342 are not federal permits but state permits, thus they do not subject applicant to consistency requirements of 16 USCS § 1456. USEPA GCO 76-20.

Because Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) applies to discharges from fixed platforms and from vessels or other floating craft while engaged in drilling and attached to ocean floor, and because there is strong Congressional intent expressed in FWPCA and Marine Protection Research and Sanctuaries Act of 1972 (33 USCS §§ 1420, 1444 et seq.) that one or other but not both laws apply to same activity, only Federal Water Pollution Control Act should be relied upon to regulate discharges from these activities. USEPA GCO 76-21.

In case of disagreement between Administrator of EPA and Secretary of Army, Administrator has ultimate authority to determine whether discharge of solid waste in waters of United States requires NPDES permit or § 404 permit. USEPA GCO 79-1.

In case brought by landowner seeking compensation for taking, landowner's failure to comply with county's development plan foreclosed his takings claim; landowner failed to establish sufficient nexus between federal Clean Water Act (33 USCS §§ 1251-1387), Coastal Zone Management Act (16 USCS §§ 1451-1464), and county's plan such that court should exclude evidence of county plan in determining pre-taking value of land. *City Nat'l Bank v United States* (1995) 33 Fed Cl 759.

### 3.--Administrative Procedure Act (5 USCS §§ 551 et seq.)

Setting of effluent limitations in permits issued under 33 USCS § 1342 is clearly "adjudicatory" in nature and requires special protections of 5 USCS §§ 554, 556 and 557 notwithstanding that § 1342(a)(1) requires only "opportunity for public hearing" and fails to specify that permit limitations must be "determined on the record"; NPDES permits issued to oil company for certain onshore facilities would be required to provide that upsets beyond control of permit holder are not violations of permit standards since BPCTCA standards written into permits were written on basis of 97.5 or 99 percent "confidence interval" and to require companies to meet standards 100 percent of time would exceed requirements of Act. *Marathon Oil Co. v EPA* (1977, CA9) 564 F2d 1253, 12 Env't Rep Cas 1098.

33 USCS § 1342

Proceedings for issuance of permit under 33 USCS § 1342 are subject to 5 USCS § 554 notwithstanding that words "on the record" are not used in conjunction with requirement for public hearing. *Seacoast Anti-Pollution League v Costle* (1978, CA1) 572 F2d 872, 11 *Env't Rep Cas* 1358, 8 *ELR* 20207, cert den (1978) 439 US 824, 58 L Ed 2d 117, 99 S Ct 94, 12 *Env't Rep Cas* 1081.

Administrator's exercise of veto power under 33 USCS § 1342(d) is subject to judicial review under Administrative Procedure Act; Administrator's exercise of veto power conferred by 33 USCS § 1342(d) is contingent on antecedent formulation of guideline regulations under 33 USCS § 1314(b) in conformity with rulemaking provisions of Administrative Procedure Act. *Washington v United States EPA* (1978, CA9 Wash) 573 F2d 583, 11 *Env't Rep Cas* 1339, 8 *ELR* 20314.

Environmental Protection Agency's decision to grant permit to discharge pollutants is subject to procedural requirements of 5 USCS §§ 556 and 557. *Gallagher & Ascher Co. v Simon* (1982, CA7 Ill) 687 F2d 1067, 66 *ALR Fed* 264.

Because decision to approve application for industrial discharge under 33 USCS § 1342 is essentially factual determination, EPA need not provide notice and comment under 5 USCS § 553. *Natural Resources Defense Council, Inc. v United States EPA* (1992, CA9) 966 F2d 1292, 92 *CDOS* 4703, 92 *Daily Journal DAR* 7542, 22 *ELR* 20950, 34 *Env't Rep Cas* 2017.

EPA regulation implementing NPDES which explicitly applies 5 USCS § 558(c), allowing expired permit to continue when application for renewal has not been finally determined by agency, is upheld, despite claim that regulation implicitly extends Clean Water Act's deadline for best available technology, and fact that term of permit may not exceed 5 years under Act, since EPA's lack of independent statutory power to extend permit is overbalanced by § 558(c) and expired permit is continued, not by affirmative agency action, but by operation of law. *Natural Resources Defense Council, Inc. v U.S. EPA* (1988, App DC) 859 F2d 156, 28 *Env't Rep Cas* 1401, 19 *ELR* 20016.

33 USCS § 1342 provisions for revocation of approval for National Pollutant Discharge Elimination System of state requires public hearing which can be typified as "adjudication" as term is defined in Administrative Procedure Act, and because this adjudication must be made on basis of hearing which is directly reviewable in Court of Appeals, 33 USCS § 1342 hearings must comply with formal adjudicatory procedures of 5 USCS §§ 554, 556, 557. USEPA GCO 78-7.

#### 4.--Refuse Act (33 USCS § 407)

Fact that practical implementation of 1970 water quality limitations necessitated formal administrative permit program is not sufficient reason to say that previous absence of such program rendered general prohibition of Refuse Act of 1899 nugatory. *United States v United States Steel Corp.* (1973, CA7 Ind) 482 F2d 439, 3 *ELR* 20388, cert den (1973) 414 US 909, 38 L Ed 2d 147, 94 S Ct 229.

Because difference between standards applied to defendants in Refuse Acts suits brought before enactment of Federal Water Pollution Control Act amendments which applied to other polluters was result of savings clause (note to 33 USCS § 1251), fact that Federal Water Pollution Control Act amendments standards were not applied in establishing effluent limitations did not result in defendants' being denied equal protection of the laws. *United States v Rohm & Haas Co.* (1974, CA5 Tex) 500 F2d 167, 6 *Env't Rep Cas* 2016, 4 *ELR* 20738, cert den (1975) 420 US 962, 43 L Ed 2d 439, 95 S Ct 1352, 7 *Env't Rep Cas* 1656.

#### 5.--Relationship with other water pollution control provisions (33 USCS §§ 1251 et seq.)

Failure to comply with order issued under state law, pursuant to 33 USCS § 1342(b), relating to discharge of sewage effluent, cannot be based on failure to obtain federal funds, under 33 USCS §§ 1281 et seq., since subchapters II and III of Clean Water Act (33 USCS §§ 1251 et seq.), which comprehensively regulate grants for construction of treatment works and enforcement of orders for their construction, are not mutually dependent. *Mumford Cove Asso. v Groton* (1986, CA2 Conn) 786 F2d 530, 24 *Env't Rep Cas* 1116, 4 *FR Serv* 3d 510, 16 *ELR* 20532.

Deep well injection, although not endangering navigable waters nor drinking waters, is subject to Resource Conservation and Recovery Act not because dictionary requires court to distinguish between discharge and disposal, but because failure to make distinction would create senseless regulatory gap. *Inland Steel Co. v EPA* (1990, CA7) 901 F2d 1419, 31 *Env't Rep Cas* 1527, 20 *ELR* 20889, reh den, en banc (1990, CA7) 1990 US App LEXIS 9693.

Petition challenging ruling of EPA filed by Associations that represented certain oil and gas businesses was not ripe for review because EPA ruling was not final, ruling could inappropriately interfere with administrative action, EPA in-

33 USCS § 1342

indicated that it intended to examine further issues presented by 33 USCS § 1342(l)(2), and associations would not have suffered significant hardship if court declined to supersede administrative process. *Tex. Indep. Producers & Royalty Owners Ass'n v United States EPA* (2005, CA5 Tex) 413 F3d 479, 60 *Env't Rep Cas* 1756, 35 *ELR* 20117, 161 *OGR* 995.

Plaintiff properly brought citizen suit under 33 USCS § 1365 against mining company for alleged violations of Federal Water Pollution Control Act because plaintiff fulfilled notice and filing requirements of 33 USCS § 1319(g)(6)(B)(ii) before state instituted administrative enforcement proceedings under 33 USCS § 1342 so that bar of § 1319(g)(6)(A) was inapplicable based on purpose of Act under 33 USCS § 1251(a) and clear meaning of § 1319(g)(6)(B). *Black Warrior Riverkeeper, Inc. v Cherokee Mining, LLC* (2008, CA11 Ala) 548 F3d 986, 21 *FLW Fed C* 1253.

Interrelationship of 33 USCS §§ 1311, 1314, and 1342, establishes that Administrator of Environmental Protection Agency had primary duty to publish 33 USCS § 1314(b)(1)(A) guidelines by December 31, 1974. *Natural Resources Defense Council v Train* (1974, App DC) 166 *US App DC* 312, 510 *F2d* 692, 7 *Env't Rep Cas* 1209, 5 *ELR* 20046.

Various sections of Federal Water Pollution Control Act Amendments of 1972 supported contention of Deputy Administrator of Environmental Protection Agency that 33 USCS § 1311 effluent limitations were intended to be promulgated as regulations apart from proceedings under 33 USCS § 1342. *E. I. Du Pont de Nemours & Co. v Train* (1974, WD Va) 383 *F Supp* 1244, 7 *Env't Rep Cas* 1065, 4 *ELR* 20855, *affd* (1975, CA4 Va) 528 *F2d* 1136, 8 *Env't Rep Cas* 1506, 6 *ELR* 20117, *affd* (1977) 430 *US* 112, 51 *L Ed 2d* 204, 97 *S Ct* 965, 9 *Env't Rep Cas* 1753, 7 *ELR* 20191.

Even if defendant's proposed injection disposal would constitute "discharge of a pollutant" within meaning of 33 USCS § 1311(a), defendant would not be in violation of any applicable provision within meaning of 33 USCS § 1319(a)(3) where effluent limitations under 33 USCS § 1312 which might be applicable to defendant's organic chemical waste have not as yet been established nor has defendant's application for permit under 33 USCS § 1342 been acted upon. *United States v GAF Corp.* (1975, SD Tex) 389 *F Supp* 1379, 7 *Env't Rep Cas* 1581, 5 *ELR* 20581, 51 *OGR* 99 (criticized in *Sierra Club, Lone Star Chapter v Cedar Point Oil Co.* (1996, CA5 Tex) 73 *F3d* 546, 41 *Env't Rep Cas* 1897, 34 *FR Serv* 3d 874, 26 *ELR* 20522).

Conditions and limitations contained in NPDES permits issued prior to taking of action implementing sections listed in 33 USCS § 1342 may be enforced pursuant to 33 USCS § 1319, notwithstanding language that civil actions may be brought against violators of "permit condition or limitation implementing any of (the listed) sections." *United States v Cutter Laboratories, Inc.* (1976, ED Tenn) 413 *F Supp* 1295, 9 *Env't Rep Cas* 1209, 6 *ELR* 20742.

Reasonable interpretation of FWPCA requires that 33 USCS §§ 1311 and 1343 apply concurrently to all ocean pollution within jurisdiction of Act; i.e., to obtain NPDES permit, ocean polluter must meet both technological requirements of § 1311 and ocean degradation criteria of § 1343. *Pacific Legal Foundation v Quarles* (1977, CD Cal) 440 *F Supp* 316, 10 *Env't Rep Cas* 1369, 7 *ELR* 20653, *affd* (1980, CA9 Cal) 614 *F2d* 225, 14 *Env't Rep Cas* 1111, 10 *ELR* 20271, *cert den* (1980) 449 *US* 825, 66 *L Ed 2d* 29, 101 *S Ct* 88, 14 *Env't Rep Cas* 2208.

By virtue of 33 USCS § 1311(a), making unlawful any discharge not authorized by, inter alia, 33 USCS § 1342, which provides that compliance with permit issued pursuant to such section shall be deemed compliance for purposes of EPA enforcement and civil penalties and citizen suit provisions of Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.), violation of national pollutant discharge elimination system permit is, without more, violation of Act. *Chesapeake Bay Foundation v Bethlehem Steel Corp.* (1985, DC Md) 608 *F Supp* 440, 22 *Env't Rep Cas* 1894, 15 *ELR* 20785.

Environmental Protection Agency's (EPA) approval of state procedures for prevention of degradation of state's water was arbitrary and capricious as to various aspects of state's procedures where there was not sufficient evidence in record explaining how tier 2 review, which was location-specific and required public participation, could be done at time general permit under §§ 402 or 404 of Clean Water Act, 33 USCS § 1342, 1344, was issued, rather than at time new individual discharges were proposed. *Ohio Valley Env'tl. Coalition v Horinko* (2003, SD W Va) 279 *F Supp 2d* 732, 57 *Env't Rep Cas* 1639 (criticized in *Ky. Waterways Alliance v Johnson* (2006, WD Ky) 426 *F Supp 2d* 612).

Environmental organization was not entitled to summary judgment on issue of liability on its claim that lumber companies violated 33 USCS § 1342(p) part of Clean Water Act (CWA), 33 USCS §§ 1251 et seq., based on allegations that they failed to obtain permits for discharges of storm water; failure to apply for permit and discharging without permit did not give rise to cause of action under 33 USCS § 1342(p); liability under CWA for discharges was appropriately brought under 33 USCS § 1311. *Env'tl. Prot. Info. Ctr. v Pac. Lumber Co.* (2007, ND Cal) 469 *F Supp 2d* 803, 64 *Env't Rep Cas* 1880, 37 *ELR* 20012.

33 USCS § 1342

EPA could issue National Pollutant Discharge Elimination System permits pursuant to 33 USCS § 1342 prior to promulgation of guidelines pursuant to 33 USCS § 1314. In re Marathon Oil Co. (1974) USEPA NPDES Permit Op No. 1.

Under 33 USCS §§ 1318, 1342, EPA can impose NPDES permit requirements to conduct studies to determine type of technology necessary to reflect best available technology economically achievable for facility, even in absence of promulgated guidelines pertaining to specific point source category in question. In re FMC Corp. (1976) USEPA NPDES Permit Op No. 39.

**6.----Definitions**

Term "requirement," as used in 33 USCS § 1323, providing, in part, that federal agencies, in the discharge of pollutants, shall comply with federal and state "requirements," refers principally to "condition," as this term is used in parenthetical expression in 33 USCS § 1365(f)(6), defining phrase "effluent standard or limitations under this Act" as meaning permit or condition of certification under 33 USCS § 1342 (including requirement applicable by reason of § 1323 of this Act); authority of EPA to require permits for discharge of water pollutants rests alone on 33 USCS § 1342 and does not rest on 33 USCS § 1311(a), which simply makes it "unlawful" for any person not to have required permit; fact that federal agencies, departments, and instrumentalities are not "persons" within meaning of § 1311(a) as this term is defined in 33 USCS § 1362(5) does not mean either that federal dischargers are not required to secure permits, or that their obligation to secure permit derives from different provision of FWPCA; federal discharger without permit is no less out of compliance with § 1342 than nonfederal discharger, however federal discharge is not "unlawful;" 33 USCS § 1319, which provides for federal enforcement of FWPCA, mirrors this differing treatment, in § 1311(a), of federal and nonfederal sources. *EPA v California* (1976) 426 US 200, 96 S Ct 2022, 48 L Ed 2d 578, 8 Env't Rep Cas 2089, 6 ELR 20563 (superseded by statute as stated in *United States v Pennsylvania Environmental Hearing Bd.* (1978, CA3 Pa) 584 F2d 1273, 8 ELR 20689) and (superseded by statute as stated in *United States v Puerto Rico* (1983, CA1 Puerto Rico) 721 F2d 832, 20 Env't Rep Cas 1189, 14 ELR 20003) and (superseded by statute as stated in *Parola v Weinberger* (1988, CA9 Cal) 848 F2d 956, 27 Env't Rep Cas 2081, 34 CCF P 75501, 18 ELR 20882) and (superseded by statute as stated in *United States v Air Pollution Control Bd. of Tennessee Dep't of Health & Environment* (1990, MD Tenn) 31 Env't Rep Cas 1492) and (superseded by statute as stated in *Ohio v United States Dep't of Energy* (1990, CA6 Ohio) 904 F2d 1058, 31 Env't Rep Cas 1448, 20 ELR 20953) and (superseded by statute as stated in *Sierra Club v Lujan* (1991, CA10 Colo) 931 F2d 1421, 33 Env't Rep Cas 1014, 21 ELR 21195).

In dispute regarding whether pump station, which emptied water from canal into water conservation area, required discharge permit, Court determined that definition of "discharge of pollutant" contained in 33 USCS § 1362(12) includes within its reach point sources that do not themselves generate pollutants. *S. Fla. Water Mgmt. Dist. v Miccosukee Tribe of Indians* (2004) 541 US 95, 124 S Ct 1537, 158 L Ed 2d 264, 58 Env't Rep Cas 1001, 34 ELR 20021, 17 FLW Fed S 195, reh den (2004) 541 US 1057, 124 S Ct 2198, 158 L Ed 2d 758 and appeal after remand, dismd (2009, CA11 Fla) 559 F3d 1191, 21 FLW Fed C 1563.

**7.----Guidelines**

Permit-issuing authority is to follow guidelines promulgated under 33 USCS § 1314(b) and is not to refer to independent regulations promulgated under 33 USCS § 1311; Court of Appeal's holding that EPA lacks power to promulgate effluent limitations by regulation under 33 USCS § 1311 is not inconsistent with other provisions of Act and does not render them meaningless. *CPC International, Inc. v Train* (1975, CA8) 515 F2d 1032, 7 Env't Rep Cas 1887, 5 ELR 20392.

Pursuant to 33 USCS § 1311(b)(2)(F), which requires EPA to promulgate BAT-based effluent limitation guidelines for nonconventional pollutants no later than July 1, 1987, EPA can impose BAT limitation on nonconventional pollutants on case-by-case basis, under 33 USCS § 1342(a)(1), until guidelines are promulgated. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 Env't Rep Cas 1233, 16 ELR 20610, 89 OGR 8.

**8.----Permit requirement**

Discharge of pollutants by individuals who had never obtained or applied for permit was unlawful under 33 USCS § 1311(a) even though no effluent standards were applicable to them. *United States v Frezzo Bros.* (1979, CA3 Pa) 602 F2d 1123, 13 Env't Rep Cas 1403, 9 ELR 20556, 53 ALR Fed 469, cert den (1980) 444 US 1074, 62 L Ed 2d 756, 100 S Ct 1020, 14 Env't Rep Cas 1033.

33 USCS § 1342

Exemption from permit requirement for construction of fish ponds, under 33 USCS § 1342, where ponds produce less than 100,000 pounds of fish per year, does not exempt pond from permit requirement, under 33 USCS § 1344, where pond lies in wetlands area. *Conant v United States* (1986, CA11 Fla) 786 F2d 1008, 24 *Env't Rep Cas* 1343, 16 *ELR* 20453 (criticized in *FD&P Enters. v United States Army Corps of Eng'rs* (2003, DC NJ) 239 *F Supp 2d* 509, 33 *ELR* 20140).

Environmental Protection Agency erred by denying environmental groups' petition to review National Pollution Discharge Elimination System permit issued under Clean Water Act, 33 USCS § 1342, allowing mining company to discharge toxic levels of copper into already toxic creek; under 40 C.F.R. § 122.4(i), no permit could issue because new discharge would contribute to violation of water quality standards set forth in 33 USCS § 1251(a)(3). *Friends of Pinto Creek v United States EPA* (2007, CA9) 504 *F3d* 1007, 65 *Env't Rep Cas* 1289, 37 *ELR* 20255, cert den (2009, US) 129 *S Ct* 896, 173 *L Ed 2d* 106, 68 *Env't Rep Cas* 1480.

Violation of permit application regulations was not within purview of 33 USCS § 1319(g)(1)(A) (unless there was "discharge of any pollutant," there was no violation of Clean Water Act, and point sources were, accordingly, neither statutorily obligated to comply with Environmental Protection Agency regulations for point source discharges, nor were they statutorily obligated to seek or obtain National Pollution Discharge Elimination System permit), court vacated order assessing civil penalty primarily on petitioner company's complete failure to apply for its storm water permit prior to starting construction, and remanded to agency for redetermination of amount of penalty. *Serv. Oil v United States EPA* (2009, CA8) 590 *F3d* 545.

Where logging company's runoff system utilized kind of conduits and channels embraced by § 502(14) of Clean Water Act (CWA), 33 USCS § 1362(14) pollution sources are definitively "point sources;" Environmental Protection Agency may not alter this categorization and 40 C.F.R. § 122.27 does not--and cannot--absolve silvicultural businesses of CWA's "point source" requirements and neither does § 402(p) of Clean Water Act, 33 USCS § 1342(p). *Env'tl. Prot. Info. Ctr. v Pac. Lumber Co.* (2004, ND Cal) 301 *F Supp 2d* 1102, 58 *Env't Rep Cas* 1523 (criticized in *Conservation Law Found. v Hannaford Bros. Co.* (2004, DC Vt) 327 *F Supp 2d* 325).

Environmental organization's Clean Water Act (CWA), 33 USCS §§ 1251 et seq., suit was not moot because logging company's persistent representations that its operations did not require National Pollutant Discharge Elimination System permit suggested that there was likelihood that company would resume challenged activity, procurement of state general permit, without more, was not sufficient to establish that present action was moot, and if organization were to prevail imposition of civil penalties under 33 USCS § 1319 could serve as powerful deterrent. *Env'tl. Prot. Info. Ctr. v Pac. Lumber Co.* (2006, ND Cal) 430 *F Supp 2d* 996.

#### 9.----Remedies

Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) does not require District Court to enjoin immediately all discharges that do not comply with Act's permit requirements, but rather allows District Court to order relief considered necessary to secure prompt compliance with Act, such relief including, but not being limited to, order of immediate cessation. *Weinberger v Romero-Barcelo* (1982) 456 *US* 305, 72 *L Ed 2d* 91, 102 *S Ct* 1798, 17 *Env't Rep Cas* 1217, 12 *ELR* 20538.

No federal cause of action in favor of persons seeking to challenge state agency's decisions regarding NPDES permit applications is implied under Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.). *Chesapeake Bay Foundation, Inc. v Virginia State Water Control Bd.* (1980, ED Va) 495 *F Supp* 1229, 17 *Env't Rep Cas* 1622, 11 *ELR* 20058.

#### 10. Practice and procedure

Where labor organization alleged that defendants violated Clean Water Act by discharging polluted water without permit, organization established statutory standing, original complaint was filed before violation was allegedly rectified by receipt of permit. *Bldg. & Constr. Trades Council of Buffalo v Downtown Dev., Inc.* (2006, CA2 NY) 448 *F3d* 138, 62 *Env't Rep Cas* 1385.

Where labor organization alleged that defendants violated Clean Water Act by discharging polluted water without permit, it could not be determined that claims were mooted by receipt of permit, because it was unclear whether permit allegedly obtained covered areas where alleged violations had been occurring, and claim for civil penalties remained. *Bldg. & Constr. Trades Council of Buffalo v Downtown Dev., Inc.* (2006, CA2 NY) 448 *F3d* 138, 62 *Env't Rep Cas* 1385.

EPA's duty under 33 USCS § 1342(d)(4), 40 CFR §§ 123.24, 123.44(h)(2), and Fla. Admin. Code Ann. R. 62-620.510 was discretionary, and thus, district court lacked jurisdiction under citizen-suit provision of Clean Water Act, 33 USCS § 1365(a)(2), to compel EPA to take over permitting process from State of Florida with regard to mill's request for permit to discharge water into estuary. *Sierra Club v United States EPA (2007, DC Dist Col) 475 F Supp 2d 29, 37 ELR 20055.*

Plaintiffs' property received large quantity of sediment and cleanup caused economic loss, these injuries were traceable to defendant adjoining landowner, who had released storm water onto plaintiffs' property, and injuries were fairly redressable, so plaintiffs had standing under Clean Water Act (CWA) to pursue citizen suit as to state instream water quality standard violation claims adopted under CWA. *New Manchester Resort & Golf, LLC v Douglasville Dev., LLC (2010, ND Ga) 734 F Supp 2d 1326.*

## II. PERMITS

### A. In General 11. Activities requiring permit

Construing "discharge" in accordance with its ordinary or natural meaning--when applied to water, "flowing or issuing out"--plaintiff processing plant owner's operation of dam to produce hydroelectricity could result in discharge into navigable waters, and thus, he was required to obtain state certification under § 401 of Clean Water Act, 33 USCS § 1341; Court noted that understanding that something had to be added in order to implicate § 402 of Clean Water Act, 33 USCS § 1342, did not explain what sufficed for "discharge" under 33 USCS § 1341. *S. D. Warren Co. v Me. Bd. of Envtl. Prot. (2006) 547 US 370, 126 S Ct 1843, 164 L Ed 2d 625, 62 Env't Rep Cas 1257, 19 FLW Fed S 193, 17 ALR Fed 2d 807.*

EPA Administrator, as incident to his power under 33 USCS § 1342(a) to issue permits authorizing discharge of pollutants into surface waters, does not have authority to place conditions in such permits that control disposal of waste into deep wells. *Exxon Corp. v Train (1977, CA5) 554 F2d 1310, 10 Env't Rep Cas 1289, 7 ELR 20594.*

Concentrated Animal Feeding Operation Rule (CAFO Rule), codified at 40 C.F.R. pts. 9, 122, 123, 412, violates statutory scheme under 33 USCS §§ 1311(a), (e), 1342(a)(1), (b), 1362(12), part of Clean Water Act, 33 USCS §§ 1251 et seq.; it imposes obligations on all Concentrated Animal Feeding Operations (CAFO) regardless of whether or not they have, in fact, added any pollutants to navigable waters, that is, discharged any pollutants; after all, 40 C.F.R. § 122.23(d), (f) demands that every CAFO owner or operator either apply for permit--and comply with effluent limitations contained in permit--or affirmatively demonstrate that no permit is needed because there is "no potential to discharge"; Act gives EPA jurisdiction to regulate and control only actual discharges--not potential discharges, and certainly not point sources themselves. *Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Env't Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.*

If defendant landowner's mine shaft, which was admittedly point source, was "discharging" pollutants, it was liable in citizen's suit filed by plaintiff environmental groups for violating 33 USCS §§ 1311(a), 1342, part of Clean Water Act, 33 USCS §§ 1251 et seq., whether or not landowner had caused discharge, but due to fact issues on whether shaft's pollutants were discharged into creek, summary judgment had been improper. *Sierra Club v El Paso Gold Mines (2005, CA10 Colo) 421 F3d 1133, 61 Env't Rep Cas 1274, 35 ELR 20175, reh gr, in part, reh den, in part, corrected (2005, CA10) 2005 US App LEXIS 22955 and cert den, motion gr (2006) 547 US 1065, 126 S Ct 1653, 164 L Ed 2d 411, 62 Env't Rep Cas 2088.*

Appellate court affirmed district court's finding that discharge of turbid water from Shandaken Tunnel into creek qualified as "discharge of any pollutant" under 33 USCS § 1311(a) which was defined as "any addition of any pollutant to navigable waters from any point source", 33 USCS § 1362(12), that required City of New York to obtain National Pollutant Discharge Elimination System permit because at bottom, City's arguments for reconsideration of court's holding were simply embellishments of those made in previous case and meaning of word "addition" had not changed; neither those arguments nor any intervening developments led court to conclude that its earlier holding was reached in error or should otherwise be modified. *Catskill Mts. Chapter of Trout Unlimited, Inc. v City of New York (2006, CA2 NY) 451 F3d 77, 62 Env't Rep Cas 1737, 36 ELR 20111, cert den (2007) 549 US 1252, 127 S Ct 1373, 167 L Ed 2d 160, 64 Env't Rep Cas 1672.*

40 CFR § 122.1(b)(2)'s exclusion of septic systems did not diminish § 122.1(b)(1)'s applicability and septic systems could be point sources that discharged pollutants under § 122.1(b)(1); thus, indictment against defendants, corporate developer, its two principals, and engineer, stated offense and convictions for violations of Clean Water Act under 33 USCS §§ 1319(c)(2)(A), 1342, 1344, 1362(7), (14), were affirmed. *United States v Lucas (2008, CA5 Miss) 516 F3d*

316, 66 *Env't Rep Cas* 1778, 38 *ELR* 20041, reh, en banc, den (2008, CA5) 2008 *US App LEXIS* 11529 and cert den (2008, US) 129 *S Ct* 116, 172 *L Ed 2d* 36, 67 *Env't Rep Cas* 1768.

EPA acted ultra vires in promulgating 40 *CFR* § 122.3(a) with regard to exempting certain marine activities from Clean Water Act's discharge permit requirements, and EPA's denial of plaintiffs' petition requesting repeal of § 122.3(a) was not in accordance with law; Congress expressed plain intent to require permits in any situation of pollution from point sources and EPA failed to satisfy its burden of proof with regard to its argument that Congress acquiesced to EPA's interpretation of *CWA*. *Northwest Env'tl. Advocates v EPA* (2008, CA9 Cal) 537 *F3d* 1006, 67 *Env't Rep Cas* 1748, 2008 *AMC* 2459, 38 *ELR* 20183.

Logging companies were subject to permitting requirements for discharge of stormwater runoff from logging roads since discharges associated with industrial activity were not exempted from permitting process under 33 *USCS* § 1342(p)(2)(B), logging operations were within broad definition of industrial activity, and runoff was from immediate access roads primarily dedicated to industrial activity of logging. *Northwest Env'tl. Def. Ctr. v Brown* (2010, CA9 Or) 617 *F3d* 1176, 40 *ELR* 20221.

Hauler of waste is in violation of 33 *USCS* §§ 1311(a) and 1342 by permitting discharge of pollutants from his lagoon into nearby stream without permit, despite hauler's assertion that overflow was not from "point source," where (1) overflow from discernible, confined and discrete conveyance constituted "point source" and (2) even though hauler did not intend for discharge to occur, Clean Water Act is strict liability statute. *Fishel v Westinghouse Electric Corp.* (1986, MD Pa) 640 *F Supp* 442, 24 *Env't Rep Cas* 1632, 16 *ELR* 20634.

National Pollutant Discharge Elimination System (NPDES) program does not apply to groundwater, but that question will be sent to Ninth Circuit for immediate appeal, even though some provisions of Clean Water Act (33 *USCS* §§ 1251 et seq.) refer to groundwater and some courts have held that discharges of pollutants through hydrologically connected groundwater are subject to permit requirement, because § 1342, which establishes NPDES permitting system, makes no reference to groundwater, and surface water/groundwater distinction has been in place in Oregon for more than 2 decades. *Umatilla Waterquality Protective Ass'n v Smith Frozen Foods* (1997, DC Or) 962 *F Supp* 1312, 44 *Env't Rep Cas* 1385, 27 *ELR* 21411 (criticized in *Aiello v Town of Brookhaven* (2001, ED NY) 136 *F Supp 2d* 81, 52 *Env't Rep Cas* 2111) and (criticized in *Idaho Rural Council v Bosma* (2001, DC Idaho) 143 *F Supp 2d* 1169, 53 *Env't Rep Cas* 1145) and (criticized in *Coldani v Hamm* (2007, ED Cal) 66 *Env't Rep Cas* 1069).

No permits were required for new landowners' realignment and use of access roads for farming purposes, where interpreting agricultural activity to include road construction and maintenance is consistent with other provisions of Clean Water Act (33 *USCS* §§ 1251 et seq.), because court finds that Congress intended to extend exception for road construction to farm access roads. *Na Mamo O 'Aha'ino v Galiher* (1998, DC Hawaii) 28 *F Supp 2d* 1258, 47 *Env't Rep Cas* 1972, request den, reconsideration den (1999, DC Hawaii) 60 *F Supp 2d* 1058.

National Pollutant Discharge Elimination System permit is required for county's stormwater discharge, even though county argues that it is excepted from requirement pursuant to 33 *USCS* § 1342(p)(1)(D), where EPA and DOE have independently determined that county is subject to permit requirement, and county has now applied for permit, because any argument that county still has with necessity for permit should be taken up with agencies. *Waste Action Project v Clark County* (1999, WD Wash) 45 *F Supp 2d* 1049, 49 *Env't Rep Cas* 1071, 29 *ELR* 21332.

In action by environmental organization and its members against city, mayor, and city officials for violations of 33 *USCS* §§ 1311, 1342 and Ohio Rev. Code Ann. § 6111 et seq., motions to dismiss filed by city, mayor, and city officials under *Fed. R. Civ. P.* 12(b)(1) were granted because: (1) notice letter by organization and members regarding alleged violations of first city permit failed to strictly comply with requirements of 33 *USCS* § 1365(b) and 40 *C.F.R.* § 135.3(a) in that notice letter failed to indicate dates or specific locations of alleged improper discharges and failed to specify manner in which permit was alleged to have been violated; (2) notice letter by organization and members regarding alleged violations of second city permit was insufficient under 33 *USCS* § 1365(b) and 40 *C.F.R.* § 135.3(a) because it provided no indication of which of multiple paragraphs of permit were alleged to have been violated, or activity alleged to constitute violation; and (3) neither of notice letters provided sufficient information for recipients to determine full name, address, and telephone number of persons giving notice. *Sierra Club v City of Columbus* (2003, SD Ohio) 282 *F Supp 2d* 756, 57 *Env't Rep Cas* 1238 (criticized in *Carney v Gordon County* (2006, ND Ga) 63 *Env't Rep Cas* 1907).

Environmental organization's allegations that lumber company used myriad of unpermitted culverts, drainage ditches, and other "point source"-like conduits to discharge stormwater and pollutants was sufficient to state claim under

33 USCS § 1342

CWA, 33 USCS §§ 1251 et seq. *Envtl. Prot. Info. Ctr. v Pac. Lumber Co.* (2004, ND Cal) 301 F Supp 2d 1102, 58 *Env't Rep Cas* 1523 (criticized in *Conservation Law Found. v Hannaford Bros. Co.* (2004, DC Vt) 327 F Supp 2d 325).

Where existing regulations did not require storm drain owners to obtain National Pollution Discharge Elimination System (NPDES) permit, owners did not violate Clean Water Act (CWA), 33 USCS §§ 1251-1387, by discharging pollutants through storm drain system without permit; CWA § 402 (33 USCS § 1342) could not be interpreted to require NPDES permits for all stormwater discharges notwithstanding regulations or individual determinations issued (or not issued) by Environmental Protection Agency (EPA) or authorized state agencies, and CWA did not provide court with authority, independent of EPA and state agency, to designate stormwater discharges as requiring NPDES permits. *Conservation Law Found. v Hannaford Bros. Co.* (2004, DC Vt) 327 F Supp 2d 325, aff'd (2005, CA2 Vt) 139 Fed Appx 338.

While plaintiffs offered evidence showing that surface water connection did at times exist in support of their claim of alleged violations of 33 USCS § 1342, by operation of gun club's outdoor rifle and handgun range, they offered no evidence demonstrating continuous connection between club's wetland and cove or river such that there existed no clear demarcation between waters and wetlands therefore, club was entitled to summary judgment. *Simsbury-Avon Pres. Soc'y, LLC v Metacon Gun Club, Inc.* (2007, DC Conn) 472 F Supp 2d 219, 64 *Env't Rep Cas* 2081, 37 *ELR* 20038, aff'd (2009, CA2 Conn) 575 F3d 199, 69 *Env't Rep Cas* 1187.

State agency, West Virginia Department of Environmental Protection, that had become operator by default of former mine sites that were discharging pollutants without effective National Pollution Discharge Elimination System permit was enjoined from further discharges and required to apply for permit under Clean Water Act, 33 USCS §§ 1251 et seq. *W. Va. Highlands Conservancy, Inc. v Huffman* (2009, ND W Va) 588 F Supp 2d 678.

EPA cannot require discharger through National Pollutant Discharge Elimination System permit to remove deposits of sludge or silt in navigable water where deposits were result of discharges occurring prior to 1970, either prior to issuance of permit or subsequent to issuance of permit. In re *Bristol County Water Co.* (1976) USEPA NPDES Permit Op No. 40.

Since industrial users of privately owned treatment works are subject to National Pollutant Discharge Elimination System permit requirements of 33 USCS § 1342 and may be made parties to joint permit together with privately owned works, permit conditions and requirements contained in such permit may therefore apply directly to industrial users as well as to treatment works so long as such conditions are rationally related to assured compliance with effluent limitations which apply to pollutants which are ultimately discharged into navigable waters. In re *Friendswood Development Co.* (1976) USEPA NPDES Permit Op No. 43.

Effluent limitation regulations promulgated for particular point source category under 33 USCS §§ 1311, 1314 can only be applied in National Pollutant Discharge Elimination System permit to that portion of effluent being discharged into navigable waters; such discharge can be subjected to controls in NPDES permit. In re *Borden, Inc.* (1977) USEPA NPDES Permit Op No. 56.

Illinois Pollution Control Board rule stating that discharge of any pollutant subject to federal or state regulation is unlawful unless discharge is specifically authorized in permit was consistent with FWPCA notwithstanding petitioner's argument that FWPCA does not require permit so long as discharge complies with applicable effluent limitations and no aquaculture or dredging or fill disposal project is involved. *Peabody Coal Co. v Illinois Pollution Control Bd.* (1976, 5th Dist) 36 Ill App 3d 5, 344 NE2d 279.

Application for variance from state pollution control regulation pertaining to mercury discharges to public sewer systems was properly treated as one not requiring NPDES permit since NPDES permit is not required for industrial discharges to publicly owned sewage treatment plants, even though such permit may be required for discharges by the publicly owned treatment plant itself and even though discharges by industrial user may be subject to Federal pre-treatment standards. *Monsanto Co. v Illinois Pollution Control Bd.* (1976, 5th Dist) 39 Ill App 3d 333, 350 NE2d 289, rev'd on other grounds (1977) 67 Ill 2d 276, 10 Ill Dec 231, 367 NE2d 684, 8 *ELR* 20016.

To discharge heated water and waste into Atlantic Ocean from Seabrook facility (New Hampshire) public service company would need both permit from Water Supply and Pollution Control Commission, and finding from Site Evaluation Committee that discharge would not adversely affect water quality. *Society for Protection of N.H. Forests v Site Evaluation Comm.* (1975) 115 NH 163, 337 A2d 778.

## 12.--Disposal in wells



33 USCS § 1342

33 USCS § 1342(a)(3) and (b) authorizes EPA to regulate disposal of pollutants into deep wells, at least when regulation is undertaken in conjunction with limitations on permittee's discharges into surface waters. *United States Steel Corp. v Train* (1977, CA7 Ill) 556 F2d 822, 10 *Env't Rep Cas* 1001, 7 *ELR* 20419.

Disposal of pollutants into wells is subject to regulation through conditions in National Pollutant Discharge Elimination System permit. In re *E. I. duPont de Nemours & Co.* (1975) USEPA NPDES Permit Op No. 6; In re *Jones & Laughlin Steel Corp.* (1975) USEPA NPDES Permit Op No. 8; In re *Bethlehem Steel Corp.* (1975) USEPA NPDES Permit Op No. 18.

### 13.--Dredge and filling

Decisions upholding Army Corps of Engineers Clean Water Act (CWA) jurisdiction over dredging and filling wetlands with hydrological connections with adjacent navigable waters were vacated, as phrase "waters of U.S." in CWA included only relatively permanent, standing or continuously flowing bodies of water forming geographic features; cases were remanded for further proceedings to determine whether ditches or man-made drains near each wetland were "waters" in ordinary sense of containing relatively permanent flow, and whether wetlands in question were adjacent to these waters in sense of possessing continuous surface connection that created boundary-drawing problem addressed in *Riverside Bayview. Rapanos v United States* (2006) 547 US 715, 126 S Ct 2208, 165 L Ed 2d 159, 62 *Env't Rep Cas* 1481, 19 *FLW Fed S* 275 (criticized in *Northwest Bypass Group v United States Army Corps of Eng'rs* (2007, DC NH) 470 *F Supp 2d* 30, 65 *Env't Rep Cas* 1070, 37 *ELR* 20013) and on remand, remanded (2007, CA6) 217 *Fed Appx* 431, 2007 *FED App* 116N.

Slurry (gold mining waste) that company wished to discharge into lake was defined by regulation (40 *CFR* § 232.2) as "fill material," and thus, company properly obtained discharge permit from U.S. Army Corps of Engineers (Corps) under § 404 of Clean Water Act (CWA) (33 USCS § 1344), rather than from EPA under § 402 of CWA (33 USCS § 1342); as Corps had authority to issue such permit, EPA was not allowed regulate as well. *Coeur Alaska, Inc. v Southeast Alaska Conservation Council* (2009, US) 129 S Ct 2458, 174 L Ed 2d 193, 68 *Env't Rep Cas* 1513, 21 *FLW Fed S* 973, on remand, remanded (2009, CA9 Alaska) 580 *F3d* 873.

Dredged spoil is not regulated under NPDES whether NPDES permit program is administered by EPA pursuant to 33 USCS § 1342(a) or by state pursuant to § 1342(b); state-administered NPDES permit programs, as well as EPA-administered NPDES programs are limited by exceptions delineated in § 1342(a)(1). *Minnesota by Spannaus v Hoffman* (1976, CA8 Minn) 543 F2d 1198, 9 *Env't Rep Cas* 1353, 7 *ELR* 20066, cert den and app dismd (1977) 430 US 977, 52 L Ed 2d 373, 97 S Ct 1672, 9 *Env't Rep Cas* 2073.

Secretary of Army and Corps of Engineers were not exempt from permit issuance requirements of Federal Water Pollution Control Amendments because (1) 33 USCS § 1371(a) could not be read so broadly as to exempt Secretary and Corps from permit issuance requirements for all Corps projects affecting navigation and (2) requirement of obtaining permit under 33 USCS § 1344 for discharge of dredge materials in navigable waters, after notice and opportunity for public hearings, cannot be said to "affect or impair" authority of Secretary of Army to maintain navigation. *Save Our Sound Fisheries Asso. v Callaway* (1974, DC RI) 387 *F Supp* 292, 7 *Env't Rep Cas* 1445, 4 *ELR* 20437.

Army Corps of Engineers' refusal to issue plaintiff permit for dredging and filling of land was not "taking" where, although plaintiff complied with state law requiring riparian land owners seeking to reclaim land lost through erosion to apply for coastal use permit, plaintiff did not pursue renewal when permit expired despite Corps's notice that permit had expired; by not renewing permit, plaintiff extinguished its compensable interest. *Plantation Landing Resort v United States* (1993) 30 *Fed Cl* 63, 24 *ELR* 20185, affd without op (1994, CA FC) 39 *F3d* 1197, reported in full (1994, CA FC) 1994 *US App LEXIS* 28475 and reh den (1994, CA FC) 1994 *US App LEXIS* 32670 and cert den (1995) 514 US 1095, 131 L Ed 2d 744, 115 S Ct 1822.

### 14. Permit issuance

National Pollutant Discharge Elimination System (NPDES) authorizes issuance of permits for discharge of limited amounts of effluents, under 33 USCS § 1342, and permit holders must comply with effluent limits and also must comply with various monitoring, testing, and reporting requirements, under 33 USCS § 1318; in South Carolina, Department of Health and Environmental Control is authorized to issue NPDES permits. *Friends of Earth, Inc. v Gaston Copper Recycling Corp.* (2011, CA4 SC) 629 *F3d* 387, 41 *ELR* 20055.

City did not violate Clean Water Act (33 USCS §§ 1251 et seq.) by enacting and implementing storm water ordinance before obtaining National Pollutant Discharge Elimination System (NPDES) permit, where it is undisputed that

city submitted timely application for and ultimately received NPDES permit, because city's actions were consistent with requirements of state and federal law. *Vandergriff v City of Chattanooga* (1998, ED Tenn) 44 F Supp 2d 927, affd (1999, CA6 Tenn) 182 F3d 918, reported in full (1999, CA6 Tenn) 1999 US App LEXIS 14107.

Nothing in Clean Water Act or *Or. Rev. Stat. § 468B.050(1)* provides that state-issued stipulated consent order is equivalent of National Pollution Discharge Elimination System (NPDES) permit, or that it can be construed as shield from liability; seafood processing operator was therefore liable for 332 days that it discharged waste into river without NPDES permit. *Or. State Pub. Interest Research Group, Inc. v Pac. Coast Seafoods Co.* (2005, DC Or) 361 F Supp 2d 1232, 60 *Env't Rep Cas* 1857, injunction gr (2005, DC Or) 374 F Supp 2d 902.

33 USCS § 1342 confers authority upon EPA to issue National Pollutant Discharge Elimination System permits prior to promulgation of nationally applicable effluent regulations under 33 USCS §§ 1311, 1314. In re *Evansville Materials, Inc.* (1976) USEPA NPDES Permit Op No. 38.

Failure of Congress to provide for permit-by-permit analysis of individual problems of particular discharges as expressly provided for in other sections of Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) clearly indicates that such analysis was not intended and parties are not entitled to it. USEPA GCO 74-1.

There is no requirement under 33 USCS § 1342 that adjudicatory hearing be held prior to time that EPA makes its determination on permit application. *Borg-Warner Corp. v Mauzy* (1981, 3d Dist) 100 Ill App 3d 862, 56 Ill Dec 335, 427 NE2d 415, 12 *ELR* 20599.

#### 15.--Public participation

Under 33 USCS § 1342(a)(1) provision that there be opportunity for public hearing on issuance of permits for discharge of pollutants the Environmental Protection Agency (EPA) is not required to hold public hearing on every permit action; since they are consistent with legislative purpose of encouraging public participation in National Pollutant Discharge Elimination System (NPDES) program, EPA regulations are proper where they provide for public hearing only upon filing of proper request and only when there exists a disputed issue of material fact raised by an interested party, rather than issues relating to whether factual record must be developed prior to modification of permit when only modification relates to extension of permit expiration date, and whether permit should be extended while project is under study to determine whether grant should be made to assist project. *Costle v Pacific Legal Foundation* (1980) 445 US 198, 63 L Ed 2d 329, 100 S Ct 1095, 14 *Env't Rep Cas* 1153, 10 *ELR* 20225, reh den (1980) 446 US 947, 64 L Ed 2d 804, 100 S Ct 2177.

Right of public participation under 33 USCS § 1342(a)(1) does not guarantee that particular result will flow from administrative process; right of public participation was not rendered meaningless merely because EPA, over strenuous objection from several parties to proceeding, incorporated into NPDES permit exactly the same limitations contained in previously negotiated consent decree with permittee. *Alabama ex rel. Baxley v Environmental Protection Agency* (1977, CA5) 557 F2d 1101, 10 *Env't Rep Cas* 1481, 7 *ELR* 20690.

In light of Second Circuit's holding that terms of nutrient management plans constitute effluent limitations that should have been included in National Pollutant Discharge Elimination System (NPDES) permits, Concentrated Animal Feeding Operation Rule (CAFO Rule), codified at 40 C.F.R. pts. 9, 122, 123, 412, deprives public of its right under 33 USCS § 1251(e) to assist in development, revision, and enforcement of effluent limitation; more specifically and in contravention of 33 USCS §§ 1342(a), 1342(b)(3), CAFO Rule prevents public from calling for hearing about--and then meaningfully commenting on--NPDES permits before they issue; CAFO Rule also impermissibly compromises public's ability to bring citizen-suits under 33 USCS § 1365(a), proven enforcement tool that Congress intended to be used to both spur and supplement government enforcement actions; under CAFO Rule, as written, citizens would be limited to enforcing mere requirement to develop nutrient management plan, but would be without means to enforce terms of nutrient management plans because they lack access to those terms. *Waterkeeper Alliance, Inc. v United States EPA* (2005, CA2) 399 F3d 486, 59 *Env't Rep Cas* 2089, 35 *ELR* 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

EPA reasonably interpreted "permits" and "permit applications" pursuant to 33 USCS § 1342(j), (a)(1), which were subject to Clean Water Act's public notice and hearing requirements, as not including notices of intent (NOIs) and storm water pollution prevention plans (SWPPPs); therefore, EPA did not violate 33 USCS § 1342(j), (a)(1) in issuing general permit for storm water discharge without mandating public availability of NOIs and SWPPPs or providing public with opportunity for public hearing on NOIs. *Tex. Indep. Producers & Royalty Owners Ass'n v EPA* (2005, CA7) 410 F3d 964, 60 *Env't Rep Cas* 1513, 35 *ELR* 20131, reh den, reh, en banc, den (2005, CA7) 2005 US App LEXIS 18825.

33 USCS § 1342

Drafters of Federal Water Pollution Control Act Amendments of 1972 had no intention of creating absolute rights of intervention in cases not based upon effluent standards or limitations promulgated pursuant to 33 USCS §§ 1311, 1312, 1316, 1317, 1342, and 1323. *Stream Pollution Control Board v United States Steel, Inc.* (1974, ND Ind) 62 FRD 31, 18 FR Serv 2d 1386, affd (1975, CA7 Ind) 512 F2d 1036, 7 Env't Rep Cas 1791, 5 ELR 20261.

Regulations governing adjudicatory hearings are not in excess of authority conferred by Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) to extent they authorized participation in adjudicatory hearings by persons other than permittee and EPA as parties. In re Peabody Coal Co. (1975) USEPA NPDES Permit Op No 29.

It was proper for EPA region to add new conditions to National Pollutant Discharge Elimination System permit prior to adjudicatory hearing but subsequent to public hearing, issuance and determinations by Regional Administrator, request for adjudicatory hearing in granting of public request, and issuance of public notice of adjudicatory hearing. In re FMC Corp. (1976) USEPA NPDES Permit No. 39.

#### 16. Factors considered in issuance

U.S. Army Corps of Engineers acted in accordance with law in issuing discharge permit for discharge of slurry (gold mine waste) into lake, where court deferred to reasonable interpretation in EPA memorandum of regulatory regime with respect to ambiguity of application of whether 33 USCS § 1316 applies to discharges of fill material regulated under 33 USCS § 1344; under interpretation of memorandum, EPA performance standard, forbidding solid waste discharges pursuant to 40 CFR § 440.104(b)(1), did not apply to initial discharge of slurry into lake, but applied only to later discharge of water from lake into downstream creek. *Coeur Alaska, Inc. v Southeast Alaska Conservation Council* (2009, US) 129 S Ct 2458, 174 L Ed 2d 193, 68 Env't Rep Cas 1513, 21 FLW Fed S 973, on remand, remanded (2009, CA9 Alaska) 580 F3d 873.

Permits for discharge of pollutants from oil and gas drilling are generally required to incorporate technology-based effluent limitations promulgated by EPA on nationwide, industry-wide basis, but where such have not yet been promulgated, Clean Water Act provides that EPA may establish effluent limitations on case-by-case basis according to its best professional judgment. *Natural Resources Defense Council, Inc. v U.S. Environmental Protection Agency* (1988, CA9) 863 F2d 1420, 28 Env't Rep Cas 1609, 19 ELR 20225, 104 OGR 160.

Congress intended individual plant considerations to be taken into account within nationally set effluent limitations in granting of state permits under 33 USCS § 1342(b) and (c) or granting of federal permits under § 1342(a)(1); in setting effluent limitations for potato processing industry, Administrator did not fail adequately to provide for variability in operation of waste treatment facilities, notwithstanding that variability factors were apparently arbitrarily selected rather than statistically computed, since it appeared that variability factors, selected would be sufficient to meet problems described by petitioners and since Administrator had promulgated regulations which would allow permit issuing authority to adjust applicable limitations on showing that factors applicable to individual plant are "fundamentally different" from factors considered in establishment of limitations. *American Frozen Food Institute v Train* (1976, App DC) 176 US App DC 105, 539 F2d 107, 8 Env't Rep Cas 1993, 6 ELR 20485.

Environmental group's claim that city discharged pollutants without permit in violation of Clean Water Act was dismissed on summary judgment, where city had subsequently obtained permit and claim was mooted; city had initially applied for permit but application was rejected by state's *Pollution Control Agency*. *River Ravine Rescue, Inc. v City of S. St. Paul* (2004, DC Minn) 59 Env't Rep Cas 1067.

33 USCS §§ 1342, 1343 authorizes use of marine water criteria specified in regulations as guidance in setting effluent limitations. In re Continental Oil Co. (1978) USEPA NPDES Permit Op No. 72.

In cases where no applicable effluent limitation exists, permit issuers must use their "best professional judgment" or "BPJ" to establish appropriate technology-based effluent limitations on case-by-case basis. In re: *Chukchansi Gold Resort and Casino Waste Water Treatment Plant Permit No. CA 0004009* (USEPA Environmental Appeals Board, 2009) 2009 EPA App. LEXIS 4.

#### 17.--Guidelines under 33 USCS § 1314

EPA-issued regulations, termed "effluent limitations guidelines", which EPA says are limitations under 33 USCS § 1311, applicable uniformly throughout nation, to be mechanically applied to each permit by issuer, but which industry claims are guidelines under 33 USCS § 1314, for information of, and consideration by, but not binding on, permit issuer, are to be construed as presumptively applicable to permit applications, and will control unless that presumption is rebut-

ted; factors specified in 33 USCS § 1314(b) are to be applied by permit issuer in determining whether presumptively valid effluent limitations should apply to particular source of discharge. *E. I. Du Pont de Nemours & Co. v Train* (1976, CA4) 541 F2d 1018, 8 *Env't Rep Cas* 1718, 6 *ELR* 20371, aff'd in part and rev'd in part on other grounds (1977) 430 US 112, 51 L Ed 2d 204, 97 S Ct 965, 9 *Env't Rep Cas* 1753, 7 *ELR* 20191.

Temporal feasibility of "best practicable control technology currently available" installation is not included in factors specified in 33 USCS § 1314(b) and should not be ground for variance; steel manufacturer's challenge to NPDES permit limitation on ground that it could not construct and place into operation recycling system by July 1, 1977, would be rejected where sufficient time existed from time permit was first issued; subsequent litigation is to be carried out on polluter's time, not public's. *United States Steel Corp. v Train* (1977, CA7 Ill) 556 F2d 822, 10 *Env't Rep Cas* 1001, 7 *ELR* 20419.

Application of toxicity limitations, in NPDES permit, to prohibit offshore drilling operations' discharge of drilling muds that contain additives that increase their toxicity, onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), without prior EPA approval, when mud-additive toxicity is more than 10 percent greater than that of generic mud, was not arbitrary and capricious, although limitations prohibit discharges far less toxic than nominally permitted discharges of other mud, absent showing that limitations would result in adverse effects to drilling operations' technology or cost. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 OGR 8.

NPDES permit, which does not allow offshore drilling operations' discharge of drilling muds that contain additives that increase their toxicity, onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), without prior EPA approval, is not result of patently irrational methodology, since test to evaluate muds' toxicity is widely accepted benchmark for such evaluations. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 OGR 8.

FWPCA provides for issuance of "guidelines" under 33 USCS § 1314(b) for categories of pollution point sources which "guidelines" were intended by Congress as source of guidance to Administrator in issuance of "effluent limitations" under 33 USCS § 1311 for categories and classes of pollution point sources; such "guidelines" and "effluent limitations" were intended to serve as controlling standards for state permit programs under 33 USCS § 1342; § 301 of FWPCA (33 USCS § 1311) contemplates national standards of effluent limitations rather than individual plant standards; Congress intended individual plant considerations to be taken into account within nationally set effluent limitations in the granting of state permits under 33 USCS § 1342(b) and (c) or the granting of federal permits under § 1342(a)(1). *American Frozen Food Institute v Train* (1976, App DC) 176 US App DC 105, 539 F2d 107, 8 *Env't Rep Cas* 1993, 6 *ELR* 20485.

EPA has statutory authority to include discharge limitations in National Pollutant Discharge Elimination System permits for effluent characteristics that it has chosen not to include in its promulgated effluent limitations guidelines in standards for effective industrial subcategories, especially in light of 33 USCS § 1342 which imposes conditions necessary to carry out provisions of Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.); in absence of promulgated effluent limitation guidelines, permit-issuing authority may set discharge limitations and monitoring requirements for storm water runoff on case-by-case basis, although under 12 USCS §§ 1251 et seq., permit-issuing authority should take into account those factors set forth in Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.). In re *Armco Steel Corp.* (1976) USEPA NPDES Permit Op No. 54.

In formulating permit requirements under 33 USCS § 1342 subdivision dealing with issuance of National Pollutant Discharge Elimination System permits, permit issuer must consider factors set out in 33 USCS § 1314 subdivision dealing with publication of regulations providing guidelines for effluent limitations and to revise such regulations. In re *Central Hudson Gas & Electric Corp.* (1977) USEPA NPDES Permit Op No. 63.

#### 18. Tests used to determine compliance

Application of toxicity limitations to use of mineral oil as lubricating or spotting agent in offshore drilling operations, in NPDES permit, which does not allow operations' discharge of drilling muds that contain additives that increase their toxicity, onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), without prior EPA approval that selected mineral oil will not cause muds to exceed specified toxicity levels, or is least toxic available alternative, was rational regulatory decision, since it does not prevent use of mineral oil additives and enables their development. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 OGR 8.

NPDES permit, which does not allow offshore drilling operations' discharge of drilling muds that contain additives that increase their toxicity, onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), without prior EPA approval, does not limit EPA's approval to discharge of muds that contain additives that meet restrictive toxicity tests implemented for preapproval of discharges. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 Env't Rep Cas 1233, 16 ELR 20610, 89 OGR 8.

EPA had adequately accounted for any departures from its usual criteria and procedures for ensuring scientific validity in adopting whole effluent toxicity test methods (WET tests) under Clean Water Act, 33 USCS §§ 1251 et seq., where EPA had explained distinctions between WET tests and most other approved test methods for assessing permit compliance, EPA's statistical conclusions were supported by substantial evidence, especially since there were several errors in dischargers' alternative methodology, and court rejected dischargers' arguments concerning false positives, detection limits, ability of laboratories to conduct WET testing properly and consistently, and representativeness of tests. *Edison Elec. Inst. v EPA* (2004, App DC) 364 US App DC 60, 391 F3d 1267, 59 Env't Rep Cas 1644, motion den, motion gr, dismd, in part (2004, App DC) 2004 US App LEXIS 25585.

Environmental groups bringing 33 USCS § 1365 citizen suit are denied summary judgment on certain alleged violations of corporation's National Pollutant Discharge Elimination System permit issued under 33 USCS § 1342, against which corporation submits evidence showing that particular discharges were within permit limitations set in accordance with 33 USCS § 1311, and that violation allegations are based on either miscalculation or errors technician autoanalyzer testing procedure. *Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp.* (1987, DC Md) 652 F Supp 620, 25 Env't Rep Cas 1684, 17 ELR 20623.

#### 19. Conditions included in permit

Administrator may require approved pretreatment program as condition upon POTW's grant of removal credits. *National Ass'n of Metal Finishers v EPA* (1983, CA3) 719 F2d 624, 19 Env't Rep Cas 1785, 13 ELR 21042, rev'd on other grounds (1985) 470 US 116, 84 L Ed 2d 90, 105 S Ct 1102, 22 Env't Rep Cas 1305, 15 ELR 20230.

Where amended information alleged no new facts and re-alleged identical allegation that defendant negligently violated and caused to be violated requirement imposed in pretreatment program approved under 33 USCS § 1342(b)(8), in violation of 33 USCS § 1319(c)(1)(A); because original information adequately charged negligence offense, it followed that amended information, which charged same offense, was appropriate under *Fed. R. Crim. P. 7(e)* and related back to original information. *United States v Ursitti* (2008, CD Ill) 543 F Supp 2d 971.

In permit issued by Regional Administrator concerning toxic pollutant standards and prohibitions referred to in 33 USCS § 1317 prior to time such standards or prohibitions are determined and become effective, provision in presently-issued permit or other similar language providing for automatic modification of permit upon promulgation of more stringent toxic standard under § 1317 is properly included; moreover, prior to promulgation of standards, permit may include conditions limiting or prohibiting discharge of toxic pollutants. In re *United States Pipe & Foundry Co.* (1974) USEPA NPDES Permit Op No. 2.

Administrator may include specifically defined conditions in NPDES permit since 33 USCS § 1342 authorizes Administrator to issue permits upon condition that requirements of that section and other enumerated sections are met. In re *Riverside Irrig. Dist., Ltd. & 17 Others* (1975) USEPA NPDES Permit Op No. 21.

Effluent standards, monitoring requirements and compliance schedule contained in National Pollutant Discharge Elimination System permit which were abstracted from court order and stipulation need not be made conditions of permit unless conditions are necessary to implement 33 USCS § 1311 or unless state has issued certification pursuant to 33 USCS § 1341 requiring that provisions of order and stipulation constitute conditions on permit. In re *United States Steel Corp.* (1975) USEPA NPDES Permit Op No. 22.

National Pollutant Discharge Elimination System permit may do no more than incorporate conditions proposed by Corps of Engineers as to matters affecting anchorage and navigation, since 33 USCS § 1342 grants authority to Secretary of Army to protect anchorage and navigation where NPDES Permit is proposed and does not confer any such authority or responsibility on EPA. In re *Itman Coal Co., Consolidated Coal Co.* (1975) USEPA NPDES Permit Op No. 28.

Promulgation of municipal ordinance or regulation may not be required as NPDES permit condition under 33 USCS §§ 1311, 1342; any requirement more stringent than those established pursuant to 33 USCS § 1311 which is made applicable to publicly owned treatment works by state law and regulations issued thereunder must be include in city's

33 USCS § 1342

NPDES permits pursuant to 33 USCS § 1311 subdivision dealing with establishing schedules of compliance established pursuant to state law or any federal law or regulation are required to implement any applicable water quality standard established pursuant to 33 USCS §§ 1251 et seq. In re City of Philadelphia (1977) USEPA NPDES Permit Op No. 55.

33 USCS § 1318 authorizes Regional Administrator to include condition in National Pollutant Discharge Elimination System permit that in event of noncompliance with conditions Regional Administrator be notified within 5 days and must in notification include specified pertinent information. In re Long Island Lighting Co. (1977) USEPA NPDES Permit Op No. 60.

EPA does not have statutory authority to incorporate provisions of consent decree into National Pollutant Discharge Elimination System permit consent decree which did not provide for incorporating its provisions into permit. In re Armco Steel Corp. (1977) USEPA NPDES Permit Op No. 68.

Environmental Protection Agency has authority under 33 USCS § 1342 to include best management practice requirements in NPDES permits when suitable limitations based on application of best practicable control technology currently available cannot be set; exact requirements must be developed in permit proceedings after application of factors set out in 33 USCS § 1314; EPA has authority under 33 USCS §§ 1251 et seq. to include condition requiring alternative power sources for treatment facilities be installed in NPDES permit if reasonably necessary to assure compliance with requirement of 33 USCS § 1251 et seq. In re Continental Oil Co. (1978) USEPA NPDES Permit Op No. 72.

**20.--Sewer hookup moratorium**

In remedying state's 14-year long violation of Water Pollution Control Act caused by discharge into harbor, District Court acted lawfully in imposing ban on new sewer hook-ups emptying into harbor until state water authority receives landfill acquisition authority. *United States v Metropolitan Dist. Comm'n* (1991, CA1 Mass) 930 F2d 132, 32 *Env't Rep Cas* 2011, 21 *ELR* 20963.

Environmental Protection Agency has authority under Federal Water Pollution Control Act (33 USCS §§ 1251-1376) to impose sewer hookup moratorium or diversion of land treatment as condition of national pollution discharge elimination system permit issued to municipal sewage treatment facility; characterization of diversion to land treatment as best practical treatment technology, standard not applicable to municipal systems not receiving federal grants until 1983, does not automatically bring it outside scope of agency authority to impose permit conditions necessary to assure compliance with effluent limitations. *Montgomery Environmental Coalition v Costle* (1980, App DC) 207 US App DC 233, 646 F2d 568, 15 *Env't Rep Cas* 1118, 11 *ELR* 20211, appeal after remand, remanded (1983, App DC) 19 *Env't Rep Cas* 1169.

Environmental Protection Agency has authority under Federal Water Pollution Control Act (33 USCS §§ 1251-1376) to impose sewer hookup moratorium or diversion of land treatment as condition of national pollution discharge elimination system permit issued to municipal sewage treatment facility. *Montgomery Environmental Coalition v Costle* (1980, App DC) 207 US App DC 233, 646 F2d 568, 15 *Env't Rep Cas* 1118, 11 *ELR* 20211, appeal after remand, remanded (1983, App DC) 19 *Env't Rep Cas* 1169.

Permit may not require sewer-hookup ban, but it may contain provisions requiring orderly or planned system of new sewer connections. In re Blue Plains Sewage Treatment Plant (1975) USEPA NPDES Permit Op No. 33.

**21.--Removal of waste material**

Under provisions of 33 USCS § 1342, EPA may include National Pollutant Discharge Elimination System permit conditions directly relating to sludge disposal if such conditions are shown to be necessary to attainment of effluent limitations included as conditions of permit. In re Blue Plains Sewage Treatment Plant (1975) USEPA NPDES Permit Op No. 33.

EPA may lawfully include in NPDES permit provision stating permittee shall be required to remove or pay US Army Corp of Engineers cost of removing any deposit of solid material which in judgment of District Engineer is attributable to permittee's discharge and creates hazard to anchorage and navigation; EPA can lawfully require inclusion of provision concerning deposit of solid material as modification during term of permit when Corps of Engineers reviewed originally proposed permit and did not request this provision be included at time permit was first issued; EPA can require inclusion of aforementioned provision as modification during term of permit absent finding changed conditions require modification of permit. Re Appalachian Power Co. (1979) USEPA NPDES Permit Op No. 77.

**22.--Qualified personnel**

Under 33 USCS § 1342, EPA may include National Pollutant Discharge Elimination System permit conditions requiring personnel adequately trained and qualified to perform operating, maintenance and testing functions necessary to achieve compliance with effluent reduction requirements of 33 USCS § 1311 and monitoring requirements of 33 USCS § 1318. In re Greenbriar Sewage Treatment Plant (1975) USEPA NPDES Permit Op No. 19.

### 23.--Discharge of pollutants

EPA's limitations on cadmium and mercury levels in barite, in NPDES permits controlling offshore drilling operations' pollutant discharges onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), which defines criteria for determining BAT-based effluent limitations, were not arbitrary or capricious, since adequate sources of "clean" barite at competitive prices were available to allow compliance with limitations, and permit mitigates cost effect through provision for discharge of barite but does not meet limitation, if uncontaminated barite is unavailable and permittee provides analysis of substitute. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

Permit condition prohibiting bypass falls within broad statutory authority of EPA. *Natural Resources Defense Council, Inc. v U.S. EPA* (1987, App DC) 261 *US App DC* 372, 822 F2d 104, 26 *Env't Rep Cas* 1153, 17 *ELR* 21043.

Oil refinery that held permit issued pursuant to 33 USCS §§ 1311 and 1342 was required to determine impact of its past nonconforming discharges into river, where prior court opinion and order concerning refinery's lack of monitoring program required refinery to ascertain such impact, and it was scientifically possible to do so. *Natural Resources Defense Council v Texaco Ref. & Mktg.* (1998, DC Del) 20 *F Supp 2d* 700, 47 *Env't Rep Cas* 1754, *aff'd* without op (1999, CA3 Del) 182 *F3d* 904, 49 *Env't Rep Cas* 1118.

In permit issued by Regional Administrator concerning toxic pollutant standards and prohibitions referred to in 33 USCS § 1317 prior to time such standards or prohibitions are determined and become effective, provision in presently-issued permit or other similar language providing for automatic modification of permit upon promulgation of more stringent toxic standard under § 1317 is properly included; moreover, prior to promulgation of standards, permit may include conditions limiting or prohibiting discharge of toxic pollutants. In re United States Pipe & Foundry Co. (1974) USEPA NPDES Permit Op No. 2.

Regional Administrator can limit discharge of ferric chloride and alum if limitations relate to compliance with applicable water quality standards or are determined to be pollutants, but administrator may not prohibit them simply as attempt to circumvent particular treatment technique. In re Blue Plains Sewage Treatment Plant (1975) USEPA NPDES Permit Op No. 33.

Nitrogen limit of 5.0 mg/l contained in NPDES permit was not clear error or abuse of discretion, notwithstanding contentions that (A) more stringent limit was necessary to ensure compliance with applicable water quality standards, and (B) finalization of numeric limit on nitrogen discharges should have been delayed on account of scientific uncertainty. In re: *Upper Blackstone Water Pollution, Abatement District (USEPA Environmental Appeals Board, May 28, 2010)* 2010 *EPA App. LEXIS* 17.

Specific NPDES permit limits on discharges of phosphorus, fecal coliform, and aluminum were neither clear error nor abuse of discretion. In re: *Upper Blackstone Water Pollution, Abatement District (USEPA Environmental Appeals Board, May 28, 2010)* 2010 *EPA App. LEXIS* 17.

### 24.--Hook up to regional sewer facility

EPA cannot require city to hook up to regional facility, that is, a permit cannot be written which includes as part of compliance schedule requirement of connection to regional facility. City of Robinson, Texas, Use of BRA Treatment Facility, USEPA RCO (Region 6) July 25, 1974.

### 25.--Monitoring requirement

EPA's acquired use of gas chromatography to monitor compliance with NPDES permit that prohibits offshore drilling operations' discharge of diesel oil in drilling muds and cuttings, onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), was not arbitrary or capricious, absent contrary evidence. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

EPA did not act arbitrarily or capriciously in requiring use of static laboratory sheen test to monitor compliance with NPDES permit that prohibits offshore drilling operations' discharge of free oil in drilling muds and cuttings, onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under 33 USCS § 1314(b)(2), since test requires analysis of muds and cuttings before discharge and thus would not give rise to penalties under 33 USCS §§ 1319(d) and 1369(b)(2), and permit includes upset provision so that unintentional noncompliance, beyond permittee's control, would not constitute violation. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

Effluent standards, monitoring requirements and compliance schedule contained in National Pollutant Discharge Elimination System permit which were abstracted from court order and stipulation need not be made conditions of permit unless conditions are necessary to implement 33 USCS § 1311 or unless state has issued certification pursuant to 33 USCS § 1341 requiring that provisions of order and stipulation constitute conditions on permit. In re *United States Steel Corp.* (1975) USEPA NPDES Permit Op No. 22.

Authority may be found in 33 USCS § 1318 for including in National Pollutant Discharge Elimination System permit requirement which obligates city to inventory and make analysis of pollutants discharged into local river. In re *City of Ketchum, Idaho* (1975) USEPA NPDES Permit Op No. 35.

EPA may include monitoring requirements in National Pollutant Discharge Elimination System permit applicable to privately owned treatment works and its industrial users or both in accordance with 33 USCS §§ 1318, 1342, and these requirements may be required to be performed at points other than at point of ultimate discharge. In re *Friendswood Development Co.* (1976) USEPA NPDES Permit Op No. 43.

NPDES permit requirement to monitor ambient quality controls in water and bottom sediments for certain parameters before, during and after drilling are within intendment of 33 USCS §§ 1251 et seq. since 33 USCS § 1342 specifically authorizes Administrator to include conditions on data and information collection, reporting, and other requirements. In re *Continental Oil Co.* (1978) USEPA NPDES Permit Op No. 72.

#### **26.--Joint and several liability**

EPA has statutory authority to provide in NPDES permit that industrial users of waste water treatment plant be jointly and severally responsible with plant for compliance with provisions of permit issued for treatment plant. In re *Friendswood Development Co.* (1976) USEPA NPDES Permit Op No. 43.

#### **27. Discretion of Administrator**

Any individual point source should be entitled to adjustment in effluent limitation applicable to it if it can show that its inability to meet limitation is attributable to significant amounts of pollutants in intake water; scope of discretion of Regional Administrator to make such adjustment should be carefully defined and he as well as any state permit-issuing authority should be clearly instructed as to circumstances under which credit must be given. *American Iron & Steel Institute v EPA* (1975, CA3) 526 F2d 1027, 8 *Env't Rep Cas* 1321, 6 *ELR* 20068, and (1977, CA3) 560 F2d 589, 10 *Env't Rep Cas* 1549, 7 *ELR* 20624, 44 *ALR Fed* 813, cert den (1978) 435 US 914, 55 *L Ed 2d* 505, 98 *S Ct* 1467, 11 *Env't Rep Cas* 1320.

EPA determination that regular and frequent monitoring at each of steel manufacturer's process-water or cooling water outfalls was necessary to insure prompt detection and rectification of permit violations was within broad authority granted to Administrator under 33 USCS §§ 1318 and 1342; since requirements of § 1326(b) are to be implemented through standards established pursuant to §§ 1311 and 1316, § 1342(a)(1) implicitly requires Administrator to insure compliance with § 1326(b) as one of permit conditions. *United States Steel Corp. v Train* (1977, CA7 Ill) 556 F2d 822, 10 *Env't Rep Cas* 1001, 7 *ELR* 20419.

There is no mandatory deadline under 33 USCS § 1342(j) to make permit applications and permits available to public, and thus Administrator of EPA has no nondiscretionary duty of timeliness under § 1342(j). *Rushing v Leavitt* (2005, DC Dist Col) 60 *Env't Rep Cas* 1102.

Consent decree entered into between company and Department of Justice acting on behalf of Environmental Protection Agency binds Agency in its consideration of appropriate limitations, conditions, and terms to be imposed in National Pollutant Discharge Elimination System permit to be issued to company unless Agency assessment of comments received pursuant to 33 USCS §§ 1341, 1342 concludes that condition inconsistent with decree should be imposed. In re *United States Pipe & Foundry Co.* (1974) USEPA NPDES Permit Op No. 2.



Regional Administrator does not have authority to issue permits which do not require effluent limitations based on best practicable control technology or secondary treatment for storm water runoff to be installed by July 1, 1977. In re City of Boston & Metropolitan District Com. (1976) USEPA NPDES Permit Op No. 49.

EPA Regional Administrator cannot authorize state not delegated pursuant to 33 USCS § 1342 to be region's agent for data collection and self-reporting by National Pollutant Discharge Elimination System permittees, and region is required to use EPA-approved forms for routine self-reporting by NPDES permittees. Delegation of NPDES Data Collection, USEPA RCO (Region 6) April 22, 1976.

Regional Administrator has statutory authority under 33 USCS § 1311 to include provision giving effect to state water quality standards in NPDES permit, and whether particular permit condition properly implements state water quality standard is for Regional Administrator to determine. In re Caroline Power & Light Co. (1977) USFDA NPDES Permit Op No. 65.

### **B. Federal Permits 28. Generally**

Where Environmental Protection Agency (EPA) issued permits to cities under Clean Water Act designed to prevent introduction of pollutants into storm sewers, and cities challenged statutory authority for certain provisions of permits, under 33 USCS § 1342(p), even if Chevron deference was not warranted, challenged permit conditions were within EPA's broad discretion. *City of Abilene v United States EPA* (2003, CA5) 325 F3d 657, 56 *Env't Rep Cas* 1129, 33 *ELR* 20164, reh den, reh, en banc, den (2003, CA5) 71 *Fed Appx* 443.

Even assuming arguendo that two cities' storm water discharge permits under 33 USCS § 1342(p), part of Clean Water Act, issued by Environmental Protection Agency, required them to implement federal regulatory program, cities could not establish Tenth Amendment violation without demonstrating that they had no other option but to regulate according to federal standards; however, cities were offered (and made) choice between permits at issue and alternative permits, which themselves did not exceed federal government's constitutional authority. *City of Abilene v United States EPA* (2003, CA5) 325 F3d 657, 56 *Env't Rep Cas* 1129, 33 *ELR* 20164, reh den, reh, en banc, den (2003, CA5) 71 *Fed Appx* 443.

Although NPDES permits are to incorporate requirements of effluent limitations established pursuant to various listed sections of FWPCA, 33 USCS § 1342(a)(1) clearly authorizes permits to be issued prior to taking of necessary implementing actions under those sections. *United States v Cutter Laboratories, Inc.* (1976, ED Tenn) 413 *F Supp* 1295, 9 *Env't Rep Cas* 1209, 6 *ELR* 20742.

Environmental Protection Agency must process oil company's permit application where company would not be governed by any general permit, and failure to process individual permit would result in company not being governed by any permit at all. *Kitlutsisti v Arco Alaska, Inc.* (1984, DC Alaska) 592 *F Supp* 832, 21 *Env't Rep Cas* 1608, 14 *ELR* 20691, app dismd without op, vacated without op (1985, CA9 Alaska) 772 *F2d* 912 and app dismd, vacated on other grounds, motion den (1986, CA9 Alaska) 782 *F2d* 800, 24 *Env't Rep Cas* 1951, 16 *ELR* 20363.

Requirement in 33 USCS § 1342(d)(4) that EPA "assume jurisdiction" to issue permit is not non-discretionary "duty or act" sufficient to trigger federal district court's jurisdiction under citizen-suit provision of Clean Water Act, 33 USCS § 1365(a)(2). *Sierra Club v United States EPA* (2007, DC Dist Col) 475 *F Supp 2d* 29, 37 *ELR* 20055.

EPA did not clearly err or abuse its discretion in determining that properties held in fee by non-Indians within Omaha and Winnebago Reservations were Indian country and were subject to federal NPDES permitting authority, In re: *Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, & Stanek Brothers* (USEPA Environmental Appeals Board, June 7, 2010) 2010 EPA App. LEXIS 20.

### **29. Amendment of permit**

Appropriate "best practicable control technology currently available" limitations to be applied in NPDES permit are those in effect at time of initial permit issuance; on administrative appeal from issuance of NPDES permit, EPA was not required to amend permit to include limitations drawn from Preliminary Guidance Document for Iron & Steel Industry where such limitations were promulgated after initial issuance of permit and after request for and determination to hold adjudicatory hearing. *Alabama ex rel. Baxley v Environmental Protection Agency* (1977, CA5) 557 *F2d* 1101, 10 *Env't Rep Cas* 1481, 7 *ELR* 20690.

Whether diesel oil is regulated as toxic, indicator, or conventional pollutant, EPA must engage in careful analysis of 33 USCS § 1314(b) criteria, before departing from NPDES permits and thereby depriving oil and gas exploration indus-

try of use of diesel oil in offshore drilling operations to free stuck drill pipe, which is most effective method. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

40 *CFR* § 122.44(1), which provides that NPDES permit, once issued, will not be modified to become more lenient, except in limited circumstances, does not preclude EPA's reconsideration of BAT-based effluent limitations, expressed in permits controlling offshore drilling operations' pollutant discharges onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, if restrictions' economic achievability would become significant regulatory factor, or if further study undermines restrictions' reasonableness. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

Department of Environmental Protection's (DEP) compliance order was procedurally defective and, thus, ineffective to modify underlying permit because DEP did not follow public notification requirements when it issued its order. *Ohio Valley Envtl. Coalition, Inc. v Apogee Coal Co., LLC* (2008, SD W Va) 555 *F Supp* 2d 640.

Existing, effective National Pollutant Discharge Elimination System permits will not be amended automatically to reflect any changes in guidelines resulting from resolution of pending guideline litigation, however, as matter of sound discretion, EPA will consider requests for modification of permit where modification of regulation issued pursuant to 33 *USCS* §§ 1311, 1314 results from court order. *Re Western Kraft Corp.* (1975) USEPA NPDES Permit Op No. 10.

EPA does not have legal authority to modify NPDES permit that has issued so as to include in permit provision for "zone mixing" when state in which permittee is located has adopted regulation that permits state to grant "zones of mixing" but said regulation has not been submitted to or approved by EPA pursuant to 33 *USCS* § 1313 as part of approved water quality standards for such state. *In re Sierra Pacific Power Co.* (1975) USEPA NPDES Permit Op No. 31.

EPA does have authority to commit itself in advance as to what will be sufficient reason for changing or amending NPDES permit at some future date, since 33 *USCS* § 1342 provides permit may be terminated or modified for cost, and regulations provide that modification can be effected following notice and opportunity for public hearing. *In re Richmond, Virginia* (1976) USEPA NPDES Permit Op No. 48.

### 30. Exemptions

Town was not found in violation of Clean Water Act when it deposited fill to shore up embankment, which had been on verge of collapse, where discharge of fill material was exempt from permitting provisions of 33 *USCS* §§ 1342 and 1344 because activity fell within maintenance exemption of 33 *USCS* § 1344(f)(1)(B); embankment was considered to be "transportation structure." *June v Town of Westfield* (2004, CA2 NY) 370 *F3d* 255, 58 *Env't Rep Cas* 1648.

Organizations representing individuals in oil and gas industries lacked standing to challenge general permit for uncontaminated storm water discharges issued by EPA under 33 *USCS* § 1342, as organizations' members were exempt from challenged permitting requirements; amendment to definition of oil and gas exploration under 33 *USCS* § 1362 made it clear that general permit could not apply to uncontaminated discharges from oil and gas construction sites. *Tex. Indep. Producers & Royalty Owners Ass'n v EPA* (2006, CA7) 435 *F3d* 758, 36 *ELR* 20027.

In considering environmental group's challenge under 33 *USCS* § 1369(b)(1) to EPA's final storm discharge rule, codified at 40 *CFR* § 122.26, which exempted from permitting requirements of Clean Water Act (CWA), 33 *USCS* §§ 1251 et seq., discharges of sediment from oil and gas construction activities that contributed to violations of water quality standards, court concluded that rule should be vacated because it was arbitrary and capricious under 5 *USCS* § 706(2)(A) and constituted impermissible construction of 33 *USCS* § 1342(l)(2) of CWA, as amended by § 323 of Energy Policy Act of 2005, 33 *USCS* § 1362(24); EPA's position regarding discharge of sediment-laden storm water from oil and gas construction sites represented complete departure from its previous interpretation of "contamination" under 33 *USCS* § 1342(l)(2). *NRDC v United States EPA* (2008, CA9) 526 *F3d* 591, 66 *Env't Rep Cas* 1948, 38 *ELR* 20126.

Environmental Protection Agency's (EPA) Final Rule, which provided that pesticides applied in accordance with Federal Insecticide, Fungicide, and Rodenticide Act, 7 *USCS* §§ 136 et seq., were exempt from permitting requirements of Clean Water Act (CWA), 33 *USCS* §§ 1251 et seq., was not reasonable interpretation of CWA and vacated Final Rule because: (1) EPA exceeded its authority under CWA when it issued rule that excluded pesticides from definition of "pollutant" under 33 *USCS* § 1362(6) since plain language of "chemical waste" and "biological materials" in § 1362(b) was unambiguous as to pesticides, and therefore, at least two easily defined sets of circumstances arose whereby chemical pesticides qualified as pollutants under CWA, and matter of biological nature, such as biological pesticides, qualified as biological material and fell under CWA if it was discharged into water, 33 *USCS* § 1362(6); and (2)

EPA exceeded its authority under CWA when it determined that, while pesticides were discharged by point sources, residue of those pesticides was nonetheless "nonpoint source pollutant" because given EPA's understanding of "addition" of pollutant, it was clear that under meaning of CWA, pesticide residue or excess pesticide, even if treated as distinct from pesticide, was pollutant discharged from point source because pollutant was introduced into water from outside world by pesticide applicator from point source. *Nat'l Cotton Council of Am. v United States EPA* (2009, CA6) 553 F3d 927, 2009 FED App 4P.

Administrator of Environmental Protection Agency did not have authority, in view of 15 USCS § 407 and 33 USCS § 1342, to exempt certain point sources discharging pollutants from regulations requiring permit issued by Administrator for discharges meeting effluent standards established by Federal Water Pollution Control Act Amendments of 1972, where plain language of § 1342 of 1972 statute and its legislative history demonstrate that discharge of pollutants without permit is unlawful; permit program would not be unmanageable without exemptions granted by Administrator, since there appear to be alternatives available to environmental protection agency for reducing permit workload. *Natural Resources Defense Council, Inc. v Train* (1975, DC Dist Col) 396 F Supp 1393, 7 Env't Rep Cas 1881, 5 ELR 20401, aff'd (1977, App DC) 186 US App DC 147, 568 F2d 1369, 10 Env't Rep Cas 2025, 8 ELR 20028.

Discharge from quarry property into neighboring landowners' pond was result of precipitation contacting raw material consisting of talus deposits in and below quarry and thus did not fall within exemption of 33 USCS § 1342(i). *Gill v LDI* (1998, WD Wash) 19 F Supp 2d 1188.

Environmental group's Clean Water Act (CWA), 33 USCS §§ 1251 et seq., action was dismissed because silvicultural exemption applied to defendant's logging roads because timber harvesting operations were expressly defined to be nonpoint source activity under 40 CFR § 122.27; therefore, 33 USCS § 1342(p)(2)(B) which required National Pollutant Discharge Elimination System (NPDES) permit for discharges associated with industrial activity did not apply; also 33 USCS § 1311 did not apply because there was no regulation of stormwater on forest roads. *Northwest Env't. Def. Ctr. v Brown* (2007, DC Or) 476 F Supp 2d 1188, 65 Env't Rep Cas 1696.

Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.) allows Regional Administrator to include provisions in National Pollutant Discharge Elimination System permit allowing discharge limitations to be exceeded during malfunctions, breakdowns, upsets, and maintenance periods. In re Union Oil Co. of California (1977) USEPA NPDES Permit Op No. 57.

It was reasonable application of 33 USCS § 1342 for County Board of Commissioners to determine that development, for which Board had issued permit, would not discharge pollutants from point source; therefore, there would be no discharge into wetlands in development. *Cowan v Bd. of Comm'rs* (2006) 143 Idaho 501, 148 P3d 1247.

### 31.--Emergency discharge

Permits issued to oil companies limiting effluent discharge from offshore oil and gas platforms, and providing for bypass of pollution control equipment only where unavoidable to prevent loss of life or severe property damage or where excess storm drainage or runoff would damage any facilities necessary for compliance with effluent limitations and prohibitions of permit are proper, and more liberal provision allowing pollution control equipment to be bypassed if rendered inoperative while repairs or maintenance required to maintain equipment in good working order are being performed, is not necessary; however, provision must be amended to clarify that shutting in of well, under given circumstances can constitute "severe property damage" and, if only alternative, that such shutting in can permit bypassing of pollution control system. *Marathon Oil Co. v EPA* (1977, CA9) 564 F2d 1253, 12 Env't Rep Cas 1098.

Corporation's "upset" defense to numerous alleged violations of its National Pollutant Discharge Elimination System permit issued under 33 USCS § 1342 fails as matter of law, where liability for some violations was already determined by prior summary judgment ruling in 33 USCS § 1365 citizen suit, which is res judicata, and where other group of violations consisted of permit limitation exceedances for phenol and total suspended solids (TSS) nearly every day for 2- to 3-month period at given location, since such consistent pattern of violations could not be "exceptional incident" in which "temporary noncompliance" was caused by factors beyond reasonable control of corporation. *Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp.* (1987, DC Md) 652 F Supp 620, 25 Env't Rep Cas 1684, 17 ELR 20623.

### 32. Extension of deadline

EPA is without authority to grant extension, in NPDES permits, of July 1, 1977 date set forth for compliance with effluent limitations. *Bethlehem Steel Corp. v Train* (1976, CA3) 544 F2d 657, 9 Env't Rep Cas 1420, 7 ELR 20019, cert den (1977) 430 US 975, 52 L Ed 2d 369, 97 S Ct 1666, 10 Env't Rep Cas 1285.

33 USCS § 1342

As stated in 33 USCS § 1311, Administrator has no discretion to issue National Pollutant Discharge Elimination System permit which extends date for achievement of final effluent limitations beyond July 1, 1977. In re Collier Carbon Chemical Corp. (1976) USEPA NPDES Permit Op No. 45.

EPA may issue NPDES permit to municipality with existing inadequate waste water treatment facility, which permit contains implementation schedule based in part on administrative time necessary for preparing and processing applications for state and federal construction grants. In re New London, New Hampshire (1976) USEPA NPDES Permit Op No. 47.

No modification may extend ultimate compliance date contained in National Pollutant Discharge Elimination System permit beyond relevant date established by 33 USCS § 1311. In re Richmond, Virginia (1976) USEPA NPDES Permit Op No. 48.

### 33. Violations

Discharge of pollutants from nuclear defense research plant at four points not listed on federal discharge permit is violation of permit, since permit allows discharges only in accordance with limitations and conditions therein, and does not grant facility broad permission to discharge pollutants at any place it sees fit. *Legal Environmental Assistance Foundation, Inc. v Hodel* (1984, ED Tenn) 586 F Supp 1163, 20 Env't Rep Cas 2246, 14 ELR 20425.

Requirement of Clean Water Act (33 USCS §§ 1251 et seq.) that all discharges covered by statute must have National Pollutant Discharge Elimination System permit is unconditional and absolute; any discharge except pursuant to permit is illegal; good faith efforts to acquire permits from Environmental Protection Agency did not absolve or reduce potential liability for violations of, Act since regulatory provisions of Act were written without regard to intentionality. *United States v Tom-Kat Dev., Inc.* (1985, DC Alaska) 614 F Supp 613.

Metal plating manufacturer is in violation of pollution permit where manufacturer claimed quality of city water and decrease in volume of wastewater should excuse its failure to maintain limits on concentration of pollutants discharged into river, because enforcement of permit is based on strict liability and manufacturer is responsible for all aspects of wastewater quality and concentration of pollutants discharged. *Sierra Club v C.G. Mfg., Inc.* (1986, DC Mass) 638 F Supp 492, 28 Env't Rep Cas 1108.

Town could not be excused for admitted violation of terms of National Pollutant Discharge Elimination Systems (NPDES) permit where (1) enforcement of Clean Water Act does not depend upon establishing direct causal link between violations of NPDES permit and pollution of freshwater stream, and violations are not to be excused on ground that they were "technical" or insignificant in nature, (2) town's argument that it has made reasonable efforts to comply with NPDES permit is rejected, as town must be held strictly liable, (3) action by citizens' group is not precluded under 33 USCS § 1365(b)(1)(B) because neither EPA Administrator nor State of Connecticut is "diligently prosecuting" any civil or criminal action challenging town's compliance with NPDES permit, and (4) statute barring construction of outfall without consent of municipality does not permit town to escape its obligations to operate sewage facilities in compliance with Clean Water Act. *Mumford Cove Asso. v Groton* (1986, DC Conn) 640 F Supp 392, 24 Env't Rep Cas 1409, aff'd (1986, CA2 Conn) 786 F2d 530, 24 Env't Rep Cas 1116, 4 FR Serv 3d 510, 16 ELR 20532.

Injunction against city's discharge of untreated sewage into river is proper under 33 USCS § 1342, where city's permit allows no untreated discharges; remedy is limited to those discharges that can be avoided without significant changes to city's treatment and sewer system, since otherwise city would suffer serious hardship. *United States v Niagara Falls* (1989, WD NY) 706 F Supp 1053, 29 Env't Rep Cas 1405.

U.S. claim that peat harvester violated 33 USCS § 1342 by discharging pollutants via peat bog drainage water through ditch outfalls into river without national pollutant discharge elimination system permit was not rendered moot by issuance of permit by state environmental department, where injunctive relief sought would require harvester to reduce number of outfalls that discharged pollutants to river and to comply with other requirements. *United States v Bay-Houston Towing Co.* (1999, ED Mich) 33 F Supp 2d 596, 29 ELR 21011.

### 34. Evidence of noncompliance

Discharge monitoring reports required by federal regulation to be kept by national pollutant discharge elimination system permit holder may be used to establish liability for violation of permit limitations; but proof that incidents of apparent noncompliance shown on discharge monitoring reports were exceptional incidents of unintentional and temporary noncompliance with technology based effluent limitations because of factors beyond reasonable control of permit-

tee may constitute affirmative defense to charge of permit violation. *Chesapeake Bay Foundation v Bethlehem Steel Corp.* (1985, DC Md) 608 F Supp 440, 22 Env't Rep Cas 1894, 15 ELR 20785.

In citizen suit under Clean Water Act, 33 USCS § 1365, industrial permittee can be liable for violations of NPDES permit's "average daily concentration limits," which are measured through use of 4-hour composite samples, despite contention that samples do not provide sufficiently accurate measurement of average daily concentration, since under § 1365, suit may challenge violations of any condition of NPDES permit and to hold otherwise would frustrate congressional intent to provide expeditious handling of citizen enforcement suits; further, permittee was free to measure discharges over more than 4 hours, which was permit's minimally-prescribed period. *Connecticut Fund for Environment v Raymark Industries, Inc.* (1986, DC Conn) 631 F Supp 1283, 16 ELR 20727.

Affidavit supporting environmental groups' motion for summary judgment in citizen suit claiming violations of corporation's National Pollutant Discharge Elimination System (NPDES) permit is valid, where corporation moved to strike affidavit for insufficient documentation of listed violations, because affidavits of competent project scientist and environmental consultant were made on personal knowledge, set forth admissible facts based on records kept in regular course of corporation's business, and included number of laboratory worksheets representative of over 100,000 pieces of information used to make uncontested calculations. *Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp.* (1987, DC Md) 652 F Supp 620, 25 Env't Rep Cas 1684, 17 ELR 20623.

Corporation's "bypass" defense to 33 USCS § 1365 complaint alleging violations of its National Pollutant Discharge Elimination System permit issued under 33 USCS § 1342 fails, where corporation is held to stricter state standard governing bypass allowance under 33 USCS § 1370, because, under terms of corporation's permit, bypassing facilities necessary to maintain compliance with permit was only allowed when precipitation exceeded 5.1 inches in 24 hours and rainfall on 4 dates claimed by defendant for bypasses was not even close to that level. *Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp.* (1987, DC Md) 652 F Supp 620, 25 Env't Rep Cas 1684, 17 ELR 20623.

EPA failed to prove by preponderance of evidence that animal feedlot violated of 33 USCS § 1342 by its failure to apply for a National Pollutant Discharge Elimination System permit where, although EPA presented some evidence from which one could infer that feedlot discharged pollutants to waters of United States, such inferences were not equivalent of proof of actual discharge, and there was evidence that feedlot was clean, that it was not adjacent to tributary, and that berms had some effect in reducing flow from the feedlot. In the Matter of: Lowell Vos, d/b/a Lowell Vos Feedlot (USEPA Office of ALJs, June 8, 2009) 2009 EPA ALJ LEXIS 8.

### C.State Permits

#### 1.In General 35. Generally

Requirement under 16 USCS § 1536(a)(2) to insure no jeopardy to endangered or threatened species does not apply to Environmental Protection Agency's approval of transfer to state of water quality permitting authority under 33 USCS § 1342(b), since 50 C.F.R. § 402.03 appropriately construed no-jeopardy duty to apply only to discretionary actions and approval of transfer of permitting authority was mandatory once state met triggering criteria. *Nat'l Ass'n of Home Builders v Defenders of Wildlife* (2007) 551 US 644, 127 S Ct 2518, 168 L Ed 2d 467, 64 Env't Rep Cas 1513, 37 ELR 20153, 20 FLW Fed S 454.

The Clean Water Act did not require that state officials have authority to impose administrative penalty, and since Alaska law enabled State to sue permit violators, there was no reason to find inadequate enforcement remedies; thus, petitioner native community's challenge to respondent Environmental Protection Agency's approval of Alaska's National Pollutant Discharge Elimination System failed. *Akiak Native Cmty. v United States EPA* (2010, CA9) 625 F3d 1162.

40 CFR § 123.30 did not say state program was unacceptable if not subject to same judicial review as that for federal permit challenges, and there was scant evidence of how fees would be assessed in public interest cases under *Alaska Stat. § 09.60.010(b)*, petitioner native community's challenge to respondent Environmental Protection Agency's approval of Alaska's National Pollutant Discharge Elimination System failed. *Akiak Native Cmty. v United States EPA* (2010, CA9) 625 F3d 1162.

Under Federal Water Pollution Control Act any discharge of pollutants into waters within jurisdiction of state must be pursuant to permit issued by state. *State v Republic Steel Corp.* (1973) 38 Ohio Misc 43, 67 Ohio Ops 2d 232, 311 NE2d 911.

Clean Water Act (CWA) imposed duty to apply pre-discharge treatment standards when granting National Pollutant Discharge Elimination System permit, under 33 USCS §§ 1311, 1342, and states were required to use these treatment standards, under 40 CFR §§ 122.44, 123.25, 125.3; Montana Department of Environmental Quality (DEQ) violated CWA by issuing discharge permits without imposing pre-discharge treatment standards on case-by-case basis and DEQ's own regulations required it. *N. Cheyenne Tribe v Mont. Dep't of Env'tl. Quality* (2010) 2010 MT 111, 356 Mont 296, 234 P3d 51, 70 Env't Rep Cas 1870.

### 36. Jurisdiction to issue permit

In dispute over State of Maine's discharge permitting program, pursuant to 33 USCS § 1342, as to non-tribal facilities that discharged into tribal waters, where most of land in issue did not appear to have been acquired by Secretary of U.S. Department of Interior in trust out of trust proceeds, but, rather, appeared to discharge onto reservation waters retained by tribes under Settlement Act (collectively Maine Indian Claims Settlement Acts and Maine Implementing Act, 25 USCS §§ 1721-1735, Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214) based on earlier agreements between tribes and Massachusetts and Maine, that such lands might be subject to limitations on alienation did not, pursuant to 25 USCS § 1724(h), make them lands acquired in trust for tribes by Secretary; further, even if lands were acquired by Secretary, such would not, pursuant to 25 USCS § 1725(b)(1) and Me. Rev. Stat. Ann. tit. 30, § 6204, automatically negate Maine law. *Maine v Johnson* (2007, CA1) 498 F3d 37, 64 Env't Rep Cas 2089, 37 ELR 20204.

If facility located in one state has discharge pipe located within waters of another state and 33 USCS § 1342 National Pollutant Discharge Elimination System permitting authority has been transferred by Administrator to states, state in which facility is located has 33 USCS § 1342 permitting authority and not state within which discharge pipe is located. USEPA GCO 78-8.

Because neither State of Nebraska nor Indian Tribes had been authorized to issue NPDES permits within exterior boundaries of Omaha and Winnebago Reservations, only entity that had any authority under Clean Water Act and associated regulations to issue NPDES permits within those boundaries was EPA. In re: *Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, & Stanek Brothers* (USEPA Environmental Appeals Board, June 7, 2010) 2010 EPA App. LEXIS 20.

### 37.--Jurisdiction over federal agencies

Federal installations discharging water pollutants in state with federally approved permit program are not required to secure permits from state under its program adopted pursuant to National Pollutant Discharge Elimination System (33 USCS § 1342). *EPA v California* (1976) 426 US 200, 96 S Ct 2022, 48 L Ed 2d 578, 8 Env't Rep Cas 2089, 6 ELR 20563 (superseded by statute as stated in *United States v Pennsylvania Environmental Hearing Bd.* (1978, CA3 Pa) 584 F2d 1273, 8 ELR 20689) and (superseded by statute as stated in *United States v Puerto Rico* (1983, CA1 Puerto Rico) 721 F2d 832, 20 Env't Rep Cas 1189, 14 ELR 20003) and (superseded by statute as stated in *Parola v Weinberger* (1988, CA9 Cal) 848 F2d 956, 27 Env't Rep Cas 2081, 34 CCF P 75501, 18 ELR 20882) and (superseded by statute as stated in *United States v Air Pollution Control Bd. of Tennessee Dep't of Health & Environment* (1990, MD Tenn) 31 Env't Rep Cas 1492) and (superseded by statute as stated in *Ohio v United States Dep't of Energy* (1990, CA6 Ohio) 904 F2d 1058, 31 Env't Rep Cas 1448, 20 ELR 20953) and (superseded by statute as stated in *Sierra Club v Lujan* (1991, CA10 Colo) 931 F2d 1421, 33 Env't Rep Cas 1014, 21 ELR 21195).

### 38. Amendment of permit

Environmental groups' motion for summary judgment is denied with respect to violations alleged to have occurred after October 10, 1985, where neither amended complaint nor motion in citizen suit claiming violations of corporation's National Pollutant Discharge Elimination System (NPDES) permit made mention of new, modified NPDES permit issued to corporation on that date, because court does not know what discharge limitations were in effect after October 10, 1985. *Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp.* (1987, DC Md) 652 F Supp 620, 25 Env't Rep Cas 1684, 17 ELR 20623.

Summary judgment for permit violation penalties is granted to citizen group, which has standing because members allege use of waters harmed by unpermitted discharge, against admitted polluter because "memorandum of understanding" (MOU) between state and polluter expressly continued permit terms, state did not follow statutory permit modification procedures for MOU, and 33 USCS § 1342(o) forbids easing of permit terms; MOU did not constitute "state enforcement proceedings" under 33 USCS § 1365(b)(1)(B) or (g)(6)(A) since state never instituted court proceedings, enforcement of MOU is not comparable to federal Act, and case is not moot even though unpermitted discharge stopped

after case was filed. *Public Interest Research Group v New Jersey Expressway Auth.* (1992, DC NJ) 822 F Supp 174, 37 *Env't Rep Cas* 1423, 23 *ELR* 20420, 24 *ELR* 20329.

If state adds new requirement to National Pollutant Discharge Elimination System program, all existing state programs that do not contain new element are not revoked immediately, since Environmental Protection Agency may not revoke state programs unless they conform with procedures set forth in 33 USCS § 1342 as to administrative determination after public hearing that state is not administering program approved under 33 USCS § 1342 in accordance with requirements of that section. USEPA GCO 77-11.

## 2. Supervision by EPA 39. Permit contents and criteria

Environmental Protection Agency need not, and may not, approve state plan which state has no authority to issue because it conflicts with federal law. *EPA v California* (1976) 426 US 200, 96 S Ct 2022, 48 L Ed 2d 578, 8 *Env't Rep Cas* 2089, 6 *ELR* 20563 (superseded by statute as stated in *United States v Pennsylvania Environmental Hearing Bd.* (1978, CA3 Pa) 584 F2d 1273, 8 *ELR* 20689) and (superseded by statute as stated in *United States v Puerto Rico* (1983, CA1 Puerto Rico) 721 F2d 832, 20 *Env't Rep Cas* 1189, 14 *ELR* 20003) and (superseded by statute as stated in *Parola v Weinberger* (1988, CA9 Cal) 848 F2d 956, 27 *Env't Rep Cas* 2081, 34 CCF P 75501, 18 *ELR* 20882) and (superseded by statute as stated in *United States v Air Pollution Control Bd. of Tennessee Dep't of Health & Environment* (1990, MD Tenn) 31 *Env't Rep Cas* 1492) and (superseded by statute as stated in *Ohio v United States Dep't of Energy* (1990, CA6 Ohio) 904 F2d 1058, 31 *Env't Rep Cas* 1448, 20 *ELR* 20953) and (superseded by statute as stated in *Sierra Club v Lujan* (1991, CA10 Colo) 931 F2d 1421, 33 *Env't Rep Cas* 1014, 21 *ELR* 21195).

Administrator is to conduct primary consideration of factors enumerated in 33 USCS § 1314(b)(1)(B) and § 1314(b)(2)(B) for classes and categories of point sources and is to specify to permit grantors how some variation in standards should be made in light of those factors; i.e. permit grantors are to have limited and carefully circumscribed discretion to take into account factors as specified by Administrator. *American Iron & Steel Institute v EPA* (1975, CA3) 526 F2d 1027, 8 *Env't Rep Cas* 1321, 6 *ELR* 20068, and (1977, CA3) 560 F2d 589, 10 *Env't Rep Cas* 1549, 7 *ELR* 20624, 44 *ALR Fed* 813, cert den (1978) 435 US 914, 55 L Ed 2d 505, 98 S Ct 1467, 11 *Env't Rep Cas* 1320.

Since Administrator is required by FWPCA (33 USCS §§ 1251 et seq.) to include in permit any more stringent state limitations, including those necessary to meet state water quality standards, and is given no authority to set aside or modify those limitations in permit proceeding, he has no authority to consider challenges to validity of state water quality standards and permit proceeding, nor to consider whether limitations adopted by state were necessary to achieve its water quality standards. *United States Steel Corp. v Train* (1977, CA7 Ill) 556 F2d 822, 10 *Env't Rep Cas* 1001, 7 *ELR* 20419.

Administrator acted properly in disapproving permit and variances for effluent discharges where state granted exemption from minimum national technology-based standards because of local water quality considerations. *Crown Simpson Pulp Co. v Costle* (1981, CA9) 642 F2d 323, 16 *Env't Rep Cas* 1556, 11 *ELR* 20450, cert den (1981) 454 US 1053, 70 L Ed 2d 588, 102 S Ct 596, 16 *Env't Rep Cas* 1652.

EPA properly assumed issuing jurisdiction over National Pollutant Discharge Elimination System permit, where neither state nor paper mill owner requested public hearing on validity of EPA objections to permit which state had drafted, and where state did not submit revised permit in response to EPA objections. *Champion International Corp. v United States Environmental Protection Agency* (1988, CA4 NC) 850 F2d 182, 28 *Env't Rep Cas* 1013, 18 *ELR* 21372.

40 CFR § 123.30 did not say state program was unacceptable if not subject to same judicial review as that for federal permit challenges, and there was scant evidence of how fees would be assessed in public interest cases under *Alaska Stat.* § 09.60.010(b), petitioner native community's challenge to respondent Environmental Protection Agency's (EPA) approval of Alaska's National Pollutant Discharge Elimination System failed; Alaska had stated it would not seek fees from unsuccessful challengers unless appeal was frivolous or filed simply for delay, and if EPA determined that Alaska was not administering its program and appropriate corrective action was not taken within reasonable time, EPA was to withdraw approval of program as provided in § 1342(c)(3). *Akiak Native Cmty. v United States EPA* (2010, CA9) 625 F3d 1162.

Challenge to EPA regulation providing that Regional Administrator may reject proposed state permits if their provisions relating to records, reporting, monitoring, etc., are inadequate to assure compliance with Clean Water Act or its regulations, is rejected, where challenge claims that Act does not allow EPA to reject proposed permits based on ad hoc judgments about adequacy of particular permit's conditions, since EPA has established guidelines for determining

whether information provided by federal permittees is adequate. *Natural Resources Defense Council, Inc. v U.S. EPA* (1988, App DC) 859 F2d 156, 28 *Env't Rep Cas* 1401, 19 *ELR* 20016.

EPA rule requiring writers of pollution discharge permits to use one of three methods to interpret state water quality standards containing "narrative criteria" so as to create precise chemical-specific effluent limitations in those permits constitutes reasonable and authorized attempt at necessary gap-filling in Clean Water Act statutory scheme. *American Paper Inst. v United States EPA* (1993, App DC) 302 *US App DC* 80, 996 F2d 346, 36 *Env't Rep Cas* 2025, 23 *ELR* 20984.

Challenge to EPA's authority to regulate in-stream treatment ponds and fills necessary to reclamation of lands after surface coal mining must be dismissed, even though coal mining companies face maze of administrative regulations by 3 federal and 2 state agencies and seek guidance, because court may control EPA's action only if EPA clearly exceeds its authority and it has not. *West Virginia Coal Assn. v Reilly* (1989, SD W Va) 728 *F Supp* 1276, 20 *ELR* 20642, *aff'd* without op (1991, CA4 W Va) 932 F2d 964, reported in full (1991, CA4 W Va) 33 *Env't Rep Cas* 1353, 22 *ELR* 20092.

#### 40. Enforcement of permit

Authority of EPA Administrator to take unilateral action to enforce NPDES permit under 33 USCS § 1319(a)(3) is enforcement alternative available to Administrator notwithstanding that enforcement action takes place in state to which NPDES permit authority has been delegated under 33 USCS § 1342. *United States v Colorado Springs* (1978, DC Colo) 455 *F Supp* 1364.

EPA is granted summary judgment on claims that city exceeded effluent limits for ammonia 86 times, toxicity twice, and zinc once in its 1991 wastewater discharge permit, because city's good-faith reliance on state EPA Director's Final Findings and Order and reasonableness of its belief that it was complying with law are not defenses, but may weigh heavily in city's favor when considering penalty, since EPA can institute judicial action whenever it finds violation under 33 USCS §§ 1319 and 1342(i). *United States v City of Toledo* (1994, ND Ohio) 867 *F Supp* 603, 38 *Env't Rep Cas* 1955, 25 *ELR* 20567.

River protection and preservation organizations and others are entitled to summary judgment with regard to city's violations of Clean Water Act (33 USCS §§ 1251 et seq.) and its pollutant discharge permit, where alleged problems are in operation of combined sewer overflow (CSO) facilities, because undisputed facts show that city has failed to (1) maintain accurate records, (2) conduct first flush sampling, (3) conduct composite sampling, (4) treat each CSO treatment facility's discharge in accordance with CSO plan, and (5) comply with state water quality standards. *Upper Chattahoochee Riverkeeper Fund v City of Atlanta* (1997, ND Ga) 986 *F Supp* 1406, 46 *Env't Rep Cas* 1135, 28 *ELR* 20330.

#### Unpublished Opinions

Unpublished: It was clear that Congress intended to incorporate requirements of state-issued permits issued under 33 USCS § 1342 into federal law by making violation of their terms federal crime pursuant to 33 USCS § 1319(c)(2)(A), and district court was correct in rejecting defendant's argument that it lacked jurisdiction over charges that he knowingly bypassed wastewater pretreatment requirements imposed by discharge permit. *United States v Panyard* (2010, CA6 Mich) 2010 FED App 695N.

#### 41. Suspension of issuance of federal permits

Even with respect to programs for permits allowing discharge of pollutants into waters, which permits are authorized under 33 USCS § 1342, Environmental Protection Agency can delegate responsibilities to states without surrendering its ultimate authority over such programs as well as over individual permit actions. *E. I. Du Pont de Nemours & Co. v Train* (1977) 430 *US* 112, 51 *L Ed* 2d 204, 97 *S Ct* 965, 9 *Env't Rep Cas* 1753, 7 *ELR* 20191.

EPA's retention of jurisdiction over permit proceedings under authority of regulation providing for "issuance" of permits subject to permittee's right to request adjudicatory hearing did not violate command of 33 USCS § 1342(c)(1) that EPA "suspend the issuance of permit" upon approval of state permit program. *Central Hudson Gas & Electric Corp. v United States EPA* (1978, CA2 NY) 587 F2d 549, 12 *Env't Rep Cas* 1454, 8 *ELR* 20893.

Provision in 33 USCS § 1342 subdivision that not later than 90 days after date state submits program, Administrator shall suspend issuance of permits under subsection of § 1342 dealing with issuance of permit, does not require Administrator to divest self of all permit proceedings which have not become final for purposes of judicial review within 90 days after submission of state program; in formulating permit requirements under 33 USCS § 1342 subdivision dealing



with issuance of permits, permit issuer must consider factors set out in 33 USCS § 1314. In re Central Hudson Gas & Electric Corp. (1977) USEPA NPDES Permit Op No. 63.

#### 42.--Acts continuing to require federal permit

Only EPA Administrator has authority to grant NPDES permit applying to discharges beyond territorial seas notwithstanding delegation of permit-issuing authority to state under 33 USCS § 1342(b). *Pacific Legal Foundation v Costle* (1978, CA9) 586 F2d 650, 11 *Env't Rep Cas* 2125, 8 *ELR* 20731, rev'd on other grounds (1980) 445 US 198, 63 L Ed 2d 329, 100 S Ct 1095, 14 *Env't Rep Cas* 1153, 10 *ELR* 20225, reh den (1980) 446 US 947, 64 L Ed 2d 804, 100 S Ct 2177.

#### 43. Revocation of state permit program

Since Administrator is required by FWCPA (33 USCS §§ 1251 et seq.) to include in permit any more stringent state limitations, including those necessary to meet state water quality standards, and is given no authority to set aside or modify those limitations in permit proceeding, he has no authority to consider challenges to validity of state water quality standards in permit proceeding, nor to consider whether limitations adopted by state were necessary to achieve its water quality standards. *United States Steel Corp. v Train* (1977, CA7 Ill) 556 F2d 822, 10 *Env't Rep Cas* 1001, 7 *ELR* 20419.

There is doubt whether state authority's unsatisfactory handling of single permit would ever warrant EPA revocation of NPDES authority, much less judicial reversal of decision not to revoke; only most egregious flouting of federal requirements in context of individual permit could justify that sanction. *Save the Bay, Inc. v Administrator of Environmental Protection Agency* (1977, CA5) 556 F2d 1282, 10 *Env't Rep Cas* 1437, 7 *ELR* 20674, reh den (1977, CA5 Miss) 560 F2d 1023.

Although Indiana's National Pollutant Discharge Elimination System (NPDES) program was not in compliance, and evidence showed that Environmental Protection Agency (EPA) had known that to be true for some time, court declined to compel EPA to act immediately to withdraw approval of Indiana's NPDES program because Indiana Department of Environmental Management, as party to action by choice, was also within reach of court's ruling, and was agency which first had to be compelled to act. *Save the Valley, Inc. v United States EPA* (2002, SD Ind) 223 F Supp 2d 997, 55 *Env't Rep Cas* 1171 (criticized in *Inst. for Wildlife Prot. v United States Fish & Wildlife Serv.* (2007, DC Or) 2007 US Dist LEXIS 90969).

#### D. Review of Permits Issued 44. Review by EPA

Issuance of NPDES permit subject to two-year time limitation, which limitation was made condition of permit pursuant to certification of state water resources board, raised issues which entitled applicant to hearing at either state or federal level prior to final administrative action and, since applicant had no available channels of state review, due process required Administrator to grant hearing. *Consolidation Coal Co. v Environmental Protection Agency* (1976, CA4) 537 F2d 1236, 9 *Env't Rep Cas* 1056.

Issuance and subsequent modification of NPDES permit by State agency pursuant to its own authority under 33 USCS § 1342 was not reviewable in Court of Appeals as "Administrator's action" under 33 USCS § 1369(b). *Mianus River Preservation Committee v Administrator, Environmental Protection Agency* (1976, CA2) 541 F2d 899, 9 *Env't Rep Cas* 1174, 6 *ELR* 20597.

Language of 33 USCS § 1311(b)(1)(A)(i) expressly conditions adherence to July 1, 1977 deadline upon definition by Administrator of "best practicable control technology currently available" effluent limitations and guidelines pursuant to 33 USCS § 1314; EPA was without authority to object to state's proposed NPDES permit on ground that compliance schedules contained therein would not bring permittee into full compliance until after July 1, 1977, since Administrator's failure to promulgate necessary regulations resulted in July 1, 1977 deadline no longer being "applicable requirement" of the Act, at least with respect to permits issued subsequent to December 31, 1974. *Republic Steel Corp. v Train* (1977, CA6) 557 F2d 91, 10 *Env't Rep Cas* 1306, 7 *ELR* 20509, vacated (1978) 434 US 1030, 54 L Ed 2d 778, 98 S Ct 761, 11 *Env't Rep Cas* 1098.

Administrator's action pursuant to 33 USCS § 1342(d)(2) in objecting to state's proposed issuance of NPDES permit does not constitute "denying" of permit within meaning of 33 USCS § 1369(b)(1)(F). *Washington v United States EPA* (1978, CA9 Wash) 573 F2d 583, 11 *Env't Rep Cas* 1339, 8 *ELR* 20314.

EPA's disapproval of proposed state NPDES permit that would have approved deviation from effluent limitations applicable to steam electric generating plants based on certain site specific factors was arbitrary where EPA failed to consider factual findings and orders of state agency, particularly finding that plant would be able to achieve BAT requirements 3 years in advance of statutory deadline if permitted to adopt alternate BPT limitations and accelerate installations required to achieve BAT limitations. *Cleveland Electric Illuminating Co. v Environmental Protection Agency* (1979, CA6) 603 F2d 1, 13 Env't Rep Cas 1549, 9 ELR 20636.

Administrator's regulations authorize Presiding Officer to strike issue from adjudicatory hearing when that issue raises objection to specific limitation set forth in National Pollutant Discharge Elimination System permit and requestor contends less stringent limitation is required to carry out intentment of Federal Water Pollution Control Act (33 USCS §§ 1251 et seq.). In re Public Service Co. of Ind., Inc. (1975) USEPA NPDES Permit Op No. 34.

In adjudicatory hearing granted pursuant to regulations to establish conditions of National Pollutant Discharge Elimination System permits under 33 USCS § 1342, EPA region has discretion to include hearing on 33 USCS § 1326 subdivision dealing with capacity of cooling water intake structure's reflection of best technology available, and to defer hearing or consideration of issues dealing with other 33 USCS § 1326 subsections in related 33 USCS §§ 1311, 1314 issues until after final decision is made on original issue. In re Central Hudson Gas & Electric Corp. (1979) USEPA NPDES Permit Op No. 75.

Environmental Protection Agency cannot consent to be sued in state courts in event it exercises its veto authority under 33 USCS § 1342. New Mexico NPDES Assumption--EPA Consent to be Sued in State Courts, USEPA RCO (Region 6) January 26, 1976.

Petition for review of NPDES permit was denied, where petitioner failed to show that EPA Region clearly erred or abused its discretion by not including (A) requirement of inflow problem statement as preliminary to study report, (B) schedule for installation of flap gates or inflow controls, and (C) requirement relating to monitoring and data collection from monitoring gauges. In re: *City of Cambridge (USEPA Environmental Appeals Board, Aug. 30, 2010) 2010 EPA App. LEXIS 38.*

#### 45. Judicial review, generally

Court lacks subject matter jurisdiction to review internal memorandum from National Pollution Discharge Elimination System (NPDES) to EPA responding to inquiry from EPA regional storm water coordinator and advising coordinator that NPDES permit is required for storm water discharges from construction activities involving oil and gas facilities. *Appalachian Energy Group v EPA* (1994, CA4) 33 F3d 319, 39 Env't Rep Cas 1253, 25 ELR 20294.

Where Environmental Appeals Board denied state's motion to intervene in pollution-discharge permit proceeding, although collateral order doctrine applied to agency decision, court lacked jurisdiction over state's interlocutory appeal from conditional denial of motion to intervene because (1) state's appeal failed to meet unreviewability prong of collateral order test, and (2) there had not yet been issuance or denial of permit sufficient to support invocation of circuit court jurisdiction under 33 USCS § 1369(b)(1)(F). *Rhode Island v United States EPA* (2004, CA1) 378 F3d 19, 58 Env't Rep Cas 1993.

Provisions of 42 USCS § 1983 do not form basis for cause of action to challenge issuance of National Pollutant Discharge Elimination System (NPDES) permit under § 402 of Federal Water Pollution Control Act (33 USCS § 1342). *Chesapeake Bay Foundation, Inc. v Virginia State Water Control Board* (1980, ED Va) 501 F Supp 821, 17 Env't Rep Cas 1635.

Corporation will have opportunity to further support their defense of "impossibility" in 33 USCS § 1365 citizen suit to alleged 33 USCS § 1311 violations of their National Pollutant Discharge Elimination System permit issued under 33 USCS § 1342, where it contends permit limitations at 2 locations were later shown to be impossible to achieve and were modified in new permit, despite fact that compliance with new permit clearly is no defense to violations of past permit, because availability of "impossibility" defense in actions brought under Clean Water Act (33 USCS §§ 1251 et seq.) is unclear. *Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp.* (1987, DC Md) 652 F Supp 620, 25 Env't Rep Cas 1684, 17 ELR 20623.

Effluent limitations contained in National Pollutant Discharge Elimination System permit are properly subject of adjudicatory hearing where permit for new source was issued prior to implementing action under 33 USCS § 1316 and effluent limitations (written under authority of 33 USCS § 1341) were based on proposed but not promulgated new source standards under § 1316. Re *Carthage Zinc* (1978) USEPA NPDES Permit Op No. 71.

#### 46.--EPA action or regulations

There is strong presumption against availability of simultaneous review in both District Court and Court of Appeals; review of Administrator's action in issuing or denying NPDES permit under 33 USCS § 1342 must, by explicit terms of 33 USCS § 1369, be sought in Court of Appeals, whose jurisdiction is, absent extraordinary conditions, exclusive. *Sun Enterprises, Ltd. v Train* (1976, CA2 NY) 532 F2d 280, 8 *Env't Rep Cas* 1891, 6 *ELR* 20331.

EPA's choice of analytical methodology used to monitor compliance with effluent limitations is entitled to presumption of regularity. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

On review, EPA is to be given benefit of regulatory doubt concerning necessity for imposing limitations on barite, which contains trace amounts of restricted metals, in NPDES permits controlling offshore drilling operations' pollutant discharges onto Alaskan Outer Continental Shelf and into Bering and Beaufort Seas, under Clean Water Act (33 USCS §§ 1251 et seq.), although bioavailability of restricted metals in barite to marine environment is questionable, since they exist in highly insoluble form. *American Petroleum Institute v Environmental Protection Agency* (1986, CA5) 787 F2d 965, 24 *Env't Rep Cas* 1233, 16 *ELR* 20610, 89 *OGR* 8.

Objections made by EPA to state-issued permit are subject to judicial review in Court of Appeals under 33 USCS § 1369(b)(1), if those actions are allowed to proceed to their logical completion, but where EPA has neither granted nor denied permit, such action is not reviewable. *Champion International Corp. v United States Environmental Protection Agency* (1988, CA4 NC) 850 F2d 182, 28 *Env't Rep Cas* 1013, 18 *ELR* 21372.

Inclusion by EPA of best management practices in final rule regarding placer mining discharge water regulation was in character with original proposal and logical outgrowth of notice and comment received. *Rybachek v United States EPA* (1990, CA9) 904 F2d 1276, 31 *Env't Rep Cas* 1585, 20 *ELR* 20973.

Environmental Appeals Board (EAB) did not abuse its discretion in denying city's petition seeking review of Environmental Protection Agency's grant of National Pollutant Discharge Elimination System permit for wastewater treatment plant; city had procedurally defaulted because its petition failed to identify its specific objections to permit or to articulate why EAB should assume jurisdiction. *City of Pittsfield v United States EPA* (2010, CA1) 614 F3d 7.

District Court properly declined to review EPA regulations providing that effluent limitations in NPDES permits be expressed in gross terms without credit for presence of pollutants in intake water where postponing review until regulations were applied in concrete setting would impose no hardship on petitioners and would enhance administrative process and assist judicial review. *Diamond Shamrock Corp. v Costle* (1978, App DC) 188 *US App DC* 407, 580 F2d 670.

Expiration of national pollution discharge elimination system (NPDES) permit issued under Federal Water Pollution Control Act (33 USCS §§ 1251-1376) to publicly owned sewage treatment facility rendered moot judicial review of petition claiming that terms of permit were without substantial support in record of permit hearing and that administrative law judge improperly placed burden of proof on petitioners since authority to issue NPDES permits for discharges into Maryland waters was transferred to State of Maryland, which also issued most recent permit; however, judicial review of petition challenging NPDES permit to municipally operated sewage treatment plant was not rendered moot where petitioners experienced enormous administrative delays in challenge to issuance to permit, with 5-year permit expiring before reviewing court could reach merits, and most of claimed defects in Environmental Protection Agency proceedings were capable of repetition. *Montgomery Environmental Coalition v Costle* (1980, App DC) 207 *US App DC* 233, 646 F2d 568, 15 *Env't Rep Cas* 1118, 11 *ELR* 20211, appeal after remand, remanded (1983, App DC) 19 *Env't Rep Cas* 1169.

Because standards under 33 USCS § 1342(c)(3) for evaluation by EPA of complaint to withdraw authorization that was granted to state by National Pollution Discharge Elimination System (NPDES) were discretionary, citizens' suit under 33 USCS § 1365(a)(2) to enforce such discretionary duties was not available, and thus, citizens failed to state claim for relief; any challenge to EPA's decision to withdraw or not to withdraw state's NPDES authorization, or delay in reaching such decision, was reviewable in Court of Appeals for Eleventh Circuit pursuant to 40 C.F.R. § 123.64(8)(ii), (vii), and 33 USCS § 1369(b)(1)(D). *Sierra Club v United States EPA* (2005, ND Fla) 377 *F Supp 2d* 1205, 18 *FLW Fed D* 826.

Even where appellate judicial review of regulations is pending and where potential permittee is party to such appeal, EPA may issue individual National Pollutant Discharge Elimination System permit based upon regulations which have been promulgated in final form by agency pursuant to 33 USCS §§ 1311, 1314. In re *United States Steel Corp.*

(1975) USEPA NPDES Permit Op. No. 3; In re United States Steel Corp. (1975) USEPA NPDES Permit Op No. 23; In re Inland Steel Co. (1975) USEPA NPDES Permit Op No. 27; In re Youngstown Sheet & Tube Co. (1975) USEPA NPDES Permit Op No. 32.

#### 47. Review by federal court of state agency action

There is no federal cause of action permitting review in federal court of state decisions on NPDES applications. *District of Columbia v Schramm* (1980, App DC) 203 US App DC 272, 631 F2d 854, 15 Env't Rep Cas 1102, 10 ELR 20520.

#### 48.--Where EPA is involved

Environmental Protection Agency's action of denying variance and disapproving effluent restrictions contained in National Pollutant Discharge Elimination System permit issued by authorized state agency under 33 USCS § 1342 is directly reviewable in United States Court of Appeals under 33 USCS § 1369 "in deny section 402," since when the Agency objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "deny" a permit within the meaning of 33 USCS § 1369. *Crown Simpson Pulp Co. v Costle* (1980) 445 US 193, 63 L Ed 2d 312, 100 S Ct 1093, 14 Env't Rep Cas 1151, 10 ELR 20230 (superseded by statute as stated in *American Paper Institute, Inc. v United States Environmental Protection Agency* (1989, CA7) 19 ELR 21361).

Although Court of Appeals may review Administrator's decision not to take action to revoke state's NPDES permit-issuing authority pursuant 33 USCS § 1342(c)(3), EPA is to be given opportunity independent of litigation to formulate response to petitioner's allegations regarding state agency; i.e. request that EPA revoke state's NPDES authority and EPA response are prerequisites to review; Administrator's consideration of permit proposed to be issued by state NPDES authority and his decision not to object to permit do not constitute "action in issuing" permit within jurisdictional grant of 33 USCS § 1369(b)(1)(F); Administrator's decision not to veto state-issued NPDES permit under his 33 USCS § 1342(d)(2) authority is immune to judicial review under APA (5 USCS §§ 701 et seq.) except that District Court may review decision to insure (1) that all relevant factors were before agency, and (2) that no unlawful factors have tainted agency's exercise of discretion. *Save the Bay, Inc. v Administrator of Environmental Protection Agency* (1977, CA5) 556 F2d 1282, 10 Env't Rep Cas 1437, 7 ELR 20674, reh den (1977, CA5 Miss) 560 F2d 1023.

Allegation that federal advice to state agency operating NPDES permit system pursuant to 33 USCS § 1342 amounted to coercion, duress or undue influence is insufficient to transform actions of state agency into federal agency action reviewable in federal court. *Shell Oil Co. v Train* (1978, CA9 Cal) 585 F2d 408, 12 Env't Rep Cas 1547, 9 ELR 20023.

District court properly dismissed for lack of subject matter jurisdiction power plant owner's citizen's suit against EPA under § 505(a)(2) of Clean Water Act, 33 USCS § 1365(a)(2), alleging that EPA failed to perform non-discretionary duty in denying owner's request for formal evidentiary hearing on proposed permit and thermal variance; EPA's determination that evidentiary hearing was not mandated was reasonable interpretation of 33 USCS § 1342(a) and § 1326(a) and entitled to deference. *Dominion Energy Brayton Point, LLC v Johnson* (2006, CA1 Mass) 443 F3d 12, 62 Env't Rep Cas 1065, 36 ELR 20066.

Agency's decision not to veto state National Pollution Discharge Elimination System (NPDES) permit is not reviewable in federal district court once EPA approves state program for issuing NPDES permits; EPA's role is largely supervisory one and though it retains veto power over issuance of state permits, it may waive responsibility for objecting to noncomplying state permits and even waive notice of NPDES applications; Congress intended that state permits would be issued under state law and would be state, not federal actions. *District of Columbia v Schramm* (1980, App DC) 203 US App DC 272, 631 F2d 854, 15 Env't Rep Cas 1102, 10 ELR 20520.

District Court has jurisdiction concurrent with state court jurisdiction to review challenge to state issued NPDES permit where state permit is alleged to be violative of minimum federal guaranties set forth in FWPCA. *Chesapeake Bay Foundation, Inc. v Virginia State Water Control Bd.* (1978, ED Va) 453 F Supp 122, 11 Env't Rep Cas 1897, 8 ELR 20664.

Judicial review of EPA's review of state permit issued pursuant to 33 USCS § 1342 will not consider agency decision on de novo basis, and in order to prevail in challenge to permit issuance plaintiffs must show at least that EPA has arbitrarily failed to consider some material facts presented to it. *Hanks v Costle* (1980, ED Va) 501 F Supp 195.

Where EPA denied Clean Water Act (CWA), 33 USCS §§ 1251-1387, permit to mosquito abatement district because permit was not necessary for application of particular pesticides, district's declaratory relief suit against EPA was dismissed for lack of subject matter jurisdiction because district did not articulate "case" or "controversy" against EPA given that district and EPA agreed that no CWA permit was required; also, under 33 USCS § 1369(b)(1), venue was improper for district to dispute actions of EPA in denying permit. *Gem County Mosquito Abatement Dist. v EPA* (2005, DC Dist Col) 398 F Supp 2d 1, 60 Env't Rep Cas 1215, app dismd (2005, App DC) 2005 US App LEXIS 29505.

### III. PERMIT AS CONSTITUTING COMPLIANCE WITH OTHER ANTIPOLLUTION REQUIREMENTS

#### 49. Compliance with water quality standards

Purpose of 33 USCS § 1342(k) is to insulate permit holders from changes in various regulations during period of permit and to relieve them of having to litigate in enforcement action the question whether their permits are sufficiently strict, i.e. § 1342(k) serves purpose of giving permits finality; however, this provision plainly cannot allow deviations from 33 USCS § 1316 standards in issuing the permit. *E. I. Du Pont de Nemours & Co. v Train* (1977) 430 US 112, 51 L Ed 2d 204, 97 S Ct 965, 9 Env't Rep Cas 1753, 7 ELR 20191.

Function of 33 USCS § 1342(k) is to qualify enforcement rights and authority granted by 33 USCS §§ 1319 and 1365 and does not purport to address question of permit modification; § 1342(k) does not make terms of permit irrevocable during life of permit; EPA Administrator properly included as condition of NPDES permit issued to steel manufacturer provision that permit would be modified to reflect subsequently adopted toxic pollutant standards that are more stringent than standards contained in permit as issued. *Inland Steel Co. v Environmental Protection Agency* (1978, CA7) 574 F2d 367, 11 Env't Rep Cas 1353, 8 ELR 20354.

Because permits under National Pollution Discharge Elimination System do not establish method of determining compliance, Executive Officer of Regional Board has discretion under state code to determine method of compliance with permits. *Russian River Watershed Protection Comm. v City of Santa Rosa* (1998, CA9 Cal) 142 F3d 1136, 98 CDOS 3088, 98 Daily Journal DAR 4255, 46 Env't Rep Cas 1498, 28 ELR 21265.

NPDES permit shields its holder from liability under Clean Water Act as long as permit holder complies with express terms of permit and with Act's disclosure requirements, and permit holder does not make discharge of pollutants that was not within reasonable contemplation of permitting authority at time permit was granted. *Piney Run Pres. Ass'n v County Comm'rs* (2001, CA4 Md) 268 F3d 255, 53 Env't Rep Cas 1257, 32 ELR 20208, cert den (2002) 535 US 1077, 152 L Ed 2d 1021, 122 S Ct 1960, 54 Env't Rep Cas 2152.

Permit application filed by City of Baltimore for particular waste water treatment plant properly included sanitary sewer system and pumping station for purposes of 33 USCS § 1342(k); plaintiffs would not be allowed to show that final administrative disposition of defendants' application had not occurred due to defendants' failure to co-operate with Environmental Protection Agency since such a showing would deprive defendant of protection offered in 33 USCS § 1342(k) and because it was apparent from document filed in case that it was too early in application proceeding for plaintiffs to be able to make required showing. *Committee for Consideration of Jones Falls Sewage System v Train* (1974, DC Md) 375 F Supp 1148, 7 Env't Rep Cas 1539, aff'd (1976, CA4 Md) 539 F2d 1006, 9 Env't Rep Cas 1212, 6 ELR 20703 (criticized in *Connecticut v Am. Elec. Power Co.* (2009, CA2 NY) 582 F3d 309).

Immunity of 33 USCS § 1342(k) would extend to enforcement actions by Administrator under 33 USCS § 1319. *Committee for Consideration of Jones Falls Sewage System v Train* (1975, DC Md) 387 F Supp 526, 7 Env't Rep Cas 1544.

Any National Pollutant Discharge Elimination System permit holder in compliance with 33 USCS § 1342 permit is by law in compliance with law's applicable water quality standards requirements. USEPA GCO 76-11.

#### 50.--State standards

To discharge heated water and waste into Atlantic Ocean from Seabrook facility (New Hampshire), public service company would need both permit from Water Supply and Pollution Control Commission, and finding from State Site Evaluation Committee that discharge would not adversely affect water quality. *Society for Protection of N.H. Forests v Site Evaluation Comm.* (1975) 115 NH 163, 337 A2d 778.

#### 51. Compliance with Refuse Act (33 USCS § 407)

A polluter discharging waste in accordance with terms and conditions of NPDES permit is not in violation of Refuse Act, and injunction against chemical company precluding such company from discharging pollutants in navigable

33 USCS § 1342

waters of United States should be effective only as long as company remains in violation of Refuse Act and such decree must be modified so as not to govern company's conduct after permit has been issued (33 USCS § 1342(a)(4)); however there is no merit to contention of defendant, in continuous discharge pollution case filed by government, that it could not be held in violation of 33 USCS § 407 because it had applied for permit to discharge waste in Houston Ship Channel and 33 USCS § 1342(k) specifically provides that in any case where permit for discharge has been applied for there can be no violation of Refuse Act until December 31, 1974, since a savings clause (note to 33 USCS § 1251) provides that amendments enacted after suit in instant case was filed, but before it was tried, shall not cause abatement of any suit commenced prior to enactment of law. *United States v Rohm & Haas Co.* (1974, CA5 Tex) 500 F2d 167, 6 *Env't Rep Cas* 2016, 4 *ELR* 20738, cert den (1975) 420 US 962, 43 L Ed 2d 439, 95 S Ct 1352, 7 *Env't Rep Cas* 1656.

Although 33 USCS § 1342 specifically provides that in any case where permit for discharge has been applied for, there can be no violation of 33 USCS § 407, savings provision to 1972 amendments to Federal Water Pollution Control Act preserves § 407 claim initiated prior to amendments; where defendant's current application for new permit cannot be interposed as defense to possible § 407 violation, defendant must premise defense on its current permit (issued in 1960). *Reserve Mining Co. v Environmental Protection Agency* (1975, CA8 Minn) 514 F2d 492, 7 *Env't Rep Cas* 1618, 19 *FR Serv* 2d 1406, 5 *ELR* 20596, 29 *ALR Fed* 73, mod, en banc (1975, CA8) 7 *Env't Rep Cas* 1782 and mod on other grounds (1976, CA8 Minn) 529 F2d 181, 8 *Env't Rep Cas* 1511, 6 *ELR* 20432.

Provisions of 33 USCS § 1342(k) providing that until 1974 discharge shall not constitute violation where permit for violation has been applied for but final disposition has not been made thereof, should have prospective effect and was not intended to apply to pending litigation; thus, mere filing of application in 1971 requesting permission to discharge or deposit into navigable water or tributaries thereof did not preclude legal action for violations of 33 USCS § 407. *United States v Consolidation Coal Co.* (1973, ND W Va) 354 F Supp 173, 3 *ELR* 20425.

Final sentence of 33 USCS § 1342(k) does not disallow immunity offered unless permit application is filed within 180 days of enactment date. *Committee for Consideration of Jones Falls Sewage System v Train* (1974, DC Md) 375 F Supp 1148, 7 *Env't Rep Cas* 1539, affd (1976, CA4 Md) 539 F2d 1006, 9 *Env't Rep Cas* 1212, 6 *ELR* 20703 (criticized in *Connecticut v Am. Elec. Power Co.* (2009, CA2 NY) 582 F3d 309).

Received  
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Commission on  
State Mandates

# Exhibit 5





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OF THE 2011 SESSION  
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE  
SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE  
Division 7. Water Quality  
Chapter 4. Regional Water Quality Control  
Article 3. Regional Water Quality Control Plans

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Wat Code § 13242 (2011)*

**§ 13242. Implementing program**

The program of implementation for achieving water quality objectives shall include, but not be limited to:

- (a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.
- (b) A time schedule for the actions to be taken.
- (c) A description of surveillance to be undertaken to determine compliance with objectives.

**HISTORY:**

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

**NOTES:**

**Collateral References:**

*Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 418 "Pollution And Environmental Matters".*

**Hierarchy Notes:**

Div. 7 Note

Div. 7, Ch. 4 Note

Div. 7, Ch. 4, Art. 3 Note

**LexisNexis 50 State Surveys, Legislation & Regulations**

Water Quality

NOTES OF DECISIONS 1. Generally

**1. Generally**

Amendment to a water quality control plan that provided for the interim use of an existing water quality objective for another part of the river, which had comparable water quality, was permissible under *Wat C § 13050*, subd. (h), and constituted a program of implementation under *Wat C § 13242*; accordingly, *Wat C § 13241* did not apply. *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010, 3d Dist) 183 Cal App 4th 1110, 2010 Cal App LEXIS 514.

# Exhibit 6



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WATER CODE  
Division 7. Water Quality  
Chapter 4. Regional Water Quality Control  
Article 4. Waste Discharge Requirements

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Wat Code § 13267 (2010)*

**§ 13267. Board's investigations; Requiring technical or monitoring program reports, and availability and use thereof; Inspection of facilities; State board authority**

(a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.

(b)

(1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

(2) When requested by the person furnishing a report, the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies. However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report.

(c) In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with. The inspection shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with *Section 1822.50*) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant.

Cal Wat Code § 13267

(d) The state board or a regional board may require any person, including a person subject to a waste discharge requirement under Section 13263, who is discharging, or who proposes to discharge, wastes or fluid into an injection well, to furnish the state board or regional board with a complete report on the condition and operation of the facility or injection well, or any other information that may be reasonably required to determine whether the injection well could affect the quality of the waters of the state.

(e) As used in this section, "evidence" means any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action.

(f) The state board may carry out the authority granted to a regional board pursuant to this section if, after consulting with the regional board, the state board determines that it will not duplicate the efforts of the regional board.

**HISTORY:**

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1970 ch 918 § 5; Stats 1986 ch 1013 § 8, effective September 23, 1986; Stats 1992 ch 729 § 1 (SB 1277); Stats 2001 ch 869 § 3 (AB 1664); Stats 2006 ch 293 § 2 (SB 729), effective January 1, 2007.

**NOTES:**

**Amendments:**

**1970 Amendment:**

Added "or authorized by this division" after "relating thereto" in subd (a).

**1986 Amendment:**

In addition to making technical changes, (1) substituted "to any plan or requirement" for "thereto" in subd (a); (2) substituted "conducting an investigation specified in subdivision (a)" for "such an investigation" near the beginning of subs (b) and (c); (3) substituted "from the reports" for "therefrom" at the end of the first paragraph of subd (b); and (4) added subd (d).

**1992 Amendment:**

In addition to making technical changes, (1) added subdivision designations (b)(1) and (b)(2); (2) amended the first sentence of subd (b)(1) by substituting (a) "who has discharged, discharges, or is suspected of discharging, or who proposes" for "discharging or proposing" before "to discharge waste" both times it appears; and (b) "which the regional board requires" for "as the board may specify" at the end; and (3) substituted "performed" for "made" after "may be" near the end of subd (c).

**2001 Amendment:**

(1) Amended subd (a) by deleting "or" after "plan or requirement"; (2) amended subd (b)(1) by (a) adding "having discharged or" in two places; (b) adding the last sentence; (3) amended subd (b)(2) by (a) substituting "that might" for "which might"; (b) substituting "may not be made" for "shall not be made"; and (4) added subd (e).

**2006 Amendments:**

Added subd (f).

**Historical Derivation:**

Former Wat C § 13055, as added Stats 1949 ch 1549 § 1, amended Stats 1951 ch 1139 § 3.5, Stats 1959 ch 1299 § 21, Stats 1965 ch 1657 § 20, Stats 1967 ch 1447 § 14.

**Cross References:**

State board or regional boards to inspect facilities of discharger of pollutants pursuant to procedure set forth in subdivision (c) of this section: *Wat C § 13383*.

Perjury and subornation of perjury: *Pen C §§ 118 et seq.*

**Collateral References:**

*Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 418 "Pollution And Environmental Matters"*.

**Law Review Articles:**

Control of water quality and pollution. *45 CLR 586*.

**Hierarchy Notes:**

Div. 7 Note

Div. 7, Ch. 4 Note

Div. 7, Ch. 4, Art. 4 Note

**LexisNexis 50 State Surveys, Legislation & Regulations**

Water Quality

NOTES OF DECISIONS 1. Constitutionality of Search 2. Control of Contamination 3. Remedy 4. Institution of Proceedings 5. City as Party 6. Applicability

**1. Constitutionality of Search**

An administrative inspection warrant issued to a regional water quality control board pursuant to *Wat. Code, § 13267*, and *Code Civ. Proc., § 1822.50 et seq.*, authorizing the board to enter timberland owned by a lumber company for the purpose of inspecting the company's logging operations to determine compliance with the water quality control provisions of the Porter-Cologne Water Quality Control Act (*Wat. Code, §§ 13000-13983*), was valid and did not authorize a constitutionally forbidden search. The lumber company's unimproved timberland, for the purposes of any constitutional discussion, would reasonably be deemed, or equated with, "open fields," i.e., sites regarded as so public in nature that searches are justifiable without any particular showing of cause or exigency. Moreover, even had the board's representative gone on the lumber company's timberland without authority of statute, or otherwise, its action would reasonably have been no more than a trespass. *Joseph v. Masonite Corp. (1983, Cal App 1st Dist) 148 Cal App 3d 6, 195 Cal Rptr 629, 1983 Cal App LEXIS 2278*.

## 2. Control of Contamination

While regional water pollution control board may act in cases where there is pollution of waters and nuisance created thereby and, consequently, may act though pollution may also result in contamination, if contamination and public nuisance endangering health of inhabitants of any city or county exists, statutes place power to control in other public agencies, including state department of health, local health officers, counties and municipalities. *People v. Los Angeles* (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in *TrafficSchoolOnline, Inc. v. Clarke* (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

Assuming that control of pollution of waters of bay and nuisances, created by such pollution, is vested in regional pollution water control board, such board did not have exclusive control over conditions shown by complaint alleging not only pollution of waters of bay, but also contamination thereof and creation and existence of condition constituting public nuisance both in those waters and on the shore of bay, detrimental to health of inhabitants of plaintiff cities. *People v. Los Angeles* (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in *TrafficSchoolOnline, Inc. v. Clarke* (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

## 3. Remedy

Statute grants no remedy before regional water pollution control board to county or city within whose boundaries public nuisance exists by reason of contamination of waters or deposit of contaminated substances on shores of those waters. *People v. Los Angeles* (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in *TrafficSchoolOnline, Inc. v. Clarke* (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

Trial court committed reversible error in denying plaintiffs' petition for writ of administrative mandamus challenging a human health risk assessment order issued by a regional water quality control board on the ground the regional board did not hold an administrative hearing relating to the challenged order. *Schutte & Koerting, Inc. v. Regional Water Quality Control Bd., San Diego Region* (2007, 4th Dist) 2007 Cal App LEXIS 2146.

## 4. Institution of Proceedings

Statute contains no provisions through which city or county may institute proceedings before regional board. *People v. Los Angeles* (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in *TrafficSchoolOnline, Inc. v. Clarke* (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

Although the California Department of Forestry and Fire Protection had approved a lumber company's amended timber harvest plan, the Department of Forestry did not have exclusive jurisdiction; the California State Water Board was not estopped from exercising its own independent jurisdiction, and ordering the lumber company to monitor water quality in a river, even though the State Water Board did not appeal the Department of Forestry's decision. *Pacific Lumber Co. v. California State Water Resources Control Bd.* (2004, Cal App 1st Dist) 116 Cal App 4th 1232, 11 Cal Rptr 3d 378, 2004 Cal App LEXIS 353, aff'd *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal 4th 921, 38 Cal Rptr 3d 220, 126 P3d 1040, 2006 Cal LEXIS 1894.

## 5. City as Party

It is not required that city in which public nuisance exists by reason of pollution of waters within its boundaries be made party to proceedings instituted by board of its own motion. *People v. Los Angeles* (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in *TrafficSchoolOnline, Inc. v. Clarke* (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

## 6. Applicability

In cities' action challenging a regional water quality control board's basin plan to incorporate a trash in total maximum daily load (Trash TMDL) for a flood control channel, the trial court erred in invalidating the Trash TMDL on the ground that the regional board and the State Water Resources Control Board violated Wat Cal § 13267 by not conducting a cost/benefit analysis because, by its plain terms, § 13267 was inapplicable at the TMDL stage. The monitoring and

Cal Wat Code § 13267

reports were required by an order issued by the regional board order, not the Trash TMDL, and the reduction of trash would be implemented by other NPDES permits. *City of Arcadia v. State Water Resources Control Bd.* (2006, Cal App 4th Dist) 135 Cal App 4th 1392, 38 Cal Rptr 3d 373, 2006 Cal App LEXIS 92, rehearing denied *City of Arcadia v. State Water Resources Control Board* (2006, Cal App 4th Dist) 2006 Cal App LEXIS 221, review denied *Arcadia, City of v. State Water Resources Control Board* (2006, Cal) 2006 Cal LEXIS 4781.



# Exhibit 7



DEERING'S CALIFORNIA CODE ANNOTATED  
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\*\*\* THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 285 & EXTRA. SESS. CH. 10 \*\*\*  
OF THE 2011 SESSION  
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE  
SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE  
Division 7. Water Quality  
Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Wat Code § 13370 (2010)*

**§ 13370. Public interest in state implementation of provisions of federal act, etc.**

The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act (*33 U.S.C. Sec. 1251 et seq.*), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

**HISTORY:**

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 1; Stats 1980 ch 676 § 319; Stats 1987 ch 1189 § 1.

**NOTES:**

**Amendments:**

**1978 Amendment:**

Cal Wat Code § 13370

(1) Substituted "systems" for "system" after "provides for permit"; (2) added "and dredged or fill material" after "discharge of pollutants"; and (3) added the provisos.

**1980 Amendment:**

Routine code maintenance.

**1987 Amendment:**

(1) Restructured the former section by adding subdivision designations; (2) substituted "as follows:" for "that since" in the introductory clause; (3) added "to regulate the use and disposal of sewage sludge." at the end of subd (a); (4) added "The Federal Water Pollution Control Act, as amended," at the beginning of subd (b); (5) substituted the period for a comma at the end of subd (b); and (6) deleted "however, that the requirements of this chapter relating to the discharge of dredged or fill material shall be applicable only when the state has an approved permit program for the discharge of dredged and fill material in accordance with the provisions of the Federal Water Pollution Control Act; and provided further," after "provided," in subd (c).

**Collateral References:**

12 Witkin Summary (10th ed) Real Property §§ 893, 896.

Federal Water Pollution Control Act: 33 USCS §§ 1251 et seq.

National Pollutant Discharge Elimination System, permits: 33 USCS § 1342.

**Law Review Articles:**

The Refuse Act of 1899: Key to clean water. 58 ABAJ 468.

Local control of pollution from federal facilities; Federal Water Pollution Control Act. 11 San Diego LR 989.

Municipal Storm Water Permitting in California. 40 San Diego LR 245.

Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law Part 1 of 2: Toward Greater Certainty in Water Rights: Searching for Certainty in a State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law. 36 McGeorge LR 73.

**Annotations:**

Construction and application of provision of Federal Water Pollution Control Act (33 USCS § 1321(b)(5) and similar predecessor, formerly designated as 33 USCS § 1161(b)(4) requiring person in charge of vessel, or onshore or off-shore facility, to notify federal agency of prohibited discharge from such vessel or facility. 17 ALR Fed 804.

**Hierarchy Notes:**

Div. 7 Note

Div. 7, Ch. 5.5 Note

Water Quality

NOTES OF DECISIONS 1. Federal Facilities

**1. Federal Facilities**

Under Federal Water Pollution Control Act amendments of 1972, *86 Stat. 816, 33 USCS §§ 1251 et seq.*, federal installations discharging water pollutants in state with federally approved permit program are not required to secure permits from state under its program adopted pursuant to National Pollutant Discharge Elimination System, since amendments do not subject federal facilities to such state permit requirements with requisite degree of clarity. *EPA v. California (1976) 426 US 200, 48 L Ed 2d 578, 96 S Ct 2022, 1976 US LEXIS 105.*

# Exhibit 8



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\*\*\* THIS SECTION IS CURRENT THROUGH THE SEPTEMBER 8, 2011 \*\*\*  
\*\*\* ISSUE OF THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM  
SUBPART A -- DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

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*40 CFR 122.2*

§ 122.2 Definitions.

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Animal feeding operation is defined at § 122.23.

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sewage sludge use or disposal practice," or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," pretreatment standards, and "standards for sewage sludge use or disposal" under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions.

Approved program or approved State means a State or interstate program which has been approved or authorized by EPA under part 123.

Aquaculture project is defined at § 122.25.

Average monthly discharge limitation means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all "daily discharges" measured during a calendar month divided by the number of "daily discharges" measured during that month.

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Average weekly discharge limitation means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all "daily discharges" measured during a calendar week divided by the number of "daily discharges" measured during that week.

Best management practices ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

BMPs means "best management practices."

Bypass is defined at § 122.41(m).

Class I sludge management facility means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director, because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

Concentrated animal feeding operation is defined at § 122.23.

Concentrated aquatic animal feeding operation is defined at § 122.24.

Contiguous zone means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law 95-576, Public Law 96-483 and Public Law 97-117, 33 U.S.C. 1251 et seq.

CWA and regulations means the Clean Water Act (CWA) and applicable regulations promulgated thereunder. In the case of an approved State program, it includes State program requirements.

Daily discharge means the "discharge of a pollutant" measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.1.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

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This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

Discharge Monitoring Report ("DMR") means the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

DMR means "Discharge Monitoring Report."

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

Effluent limitation means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Effluent limitations guidelines means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

Federal Indian reservation means all land within the limits of any Indian \*67981 reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

General permit means an NPDES "permit" issued under § 122.28 authorizing a category of discharges under the CWA within a geographical area.

Hazardous substance means any substance designated under 40 CFR part 116 pursuant to section 311 of CWA.

Indian country means:

- (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- (2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- (3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Indirect discharger means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Individual control strategy is defined at 40 CFR 123.46(c).



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Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

Major facility means any NPDES "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Maximum daily discharge limitation means the highest allowable "daily discharge."

Municipal separate storm sewer system is defined at § 122.26 (b)(4) and (b)(7).

Municipality means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA.

National Pollutant Discharge Elimination System (NPDES) means the national program for issuing, modifying, revo-king and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment re-quirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

New discharger means any building, structure, facility, or installation:

- (a) From which there is or may be a "discharge of pollutants;"
- (b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;
- (c) Which is not a "new source;" and
- (d) Which has never received a finally effective NPDES permit for discharges at that "site."

This definition includes an "indirect discharger" which commences discharging into "waters of the United States" after August 13, 1979. It also includes any existing mobile point source (other than an offshore or coastal oil and gas exploratory drilling rig or a coastal oil and gas developmental drilling rig) such as a seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a "site" for which it does not have a permit; and any offshore or coastal mobile oil and gas exploratory drilling rig or coastal mobile oil and gas developmental drilling rig that commences the discharge of pollutants after August 13, 1979, at a "site" under EPA's permitting jurisdiction for which it is not covered by an individual or general permit and which is located in an area determined by the Regional Administrator in the issuance of a final permit to be an area of biological concern. In determining whether an area is an area of biological concern, the Regional Administrator shall consider the factors specified in 40 CFR 125.122(a) (1) through (10).

An offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig will be consid-ered a "new discharger" only for the duration of its discharge in an area of biological concern.

New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

- (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or
- (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 123 and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

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Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

NOTE: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

POTW is defined at § 403.3 of this chapter.

Primary industry category means any industry category listed in the NRDC settlement agreement (*Natural Resources Defense Council et al. v. Train*, 8 E.R.C. 2120 (D.D.C. 1976), modified 12 E.R.C. 1833 (D.D.C. 1979)); also listed in appendix A of part 122.

Privately owned treatment works means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works is defined at 40 CFR 403.3.

Recommencing discharger means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit", including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.

Secondary industry category means any industry category which is not a "primary industry category."

Secretary means the Secretary of the Army, acting through the Chief of Engineers.

Septage means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained.

Sewage from vessels means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage Sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings

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(33 CFR part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge.

Sewage sludge use or disposal practice means the collection, storage, treatment, transportation, processing, monitoring, use, or disposal of sewage sludge.

Silvicultural point source is defined at § 122.27.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

Sludge-only facility means any "treatment works treating domestic sewage" whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA and is required to obtain a permit under § 122.1(b)(2).

Standards for sewage sludge use or disposal means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in these regulations which meets the requirements of § 123.31 of this chapter.

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the CWA programs.

Storm water is defined at § 122.26(b)(13).

Storm water discharge associated with industrial activity is defined at § 122.26(b)(14).

Total dissolved solids means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR part 136.

Toxic pollutant means any pollutant listed as toxic under section 307(a)(1) or, in the case of "sludge use or disposal practices," any pollutant identified in regulations implementing section 405(d) of the CWA.

Treatment works treating domestic sewage means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

TWTDS means "treatment works treating domestic sewage."

Upset is defined at § 122.41(n).

Variance means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or waters of the U.S. means:

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(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension. n1

n1 EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

**HISTORY:** [48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39619, Sept. 1, 1983; 50 FR 6940, 6941, Feb. 19, 1985; 54 FR 254, Jan. 4, 1989; 54 FR 18781, May 2, 1989; 54 FR 23895, June 2, 1989; 58 FR 45037, Aug. 25, 1993 as corrected at 58 FR 48424, Sept. 15, 1993; 58 FR 67980, Dec. 22, 1993; 64 FR 41434, 42462, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 65 FR 30886, 30905, May 15, 2000]

**AUTHORITY:** (Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

**NOTES:** [EFFECTIVE DATE NOTE: 64 FR 41434, 42462, Aug. 4, 1999, added the definitions for "Indian Country" and "TWTDS," effective Dec. 2, 1999; 65 FR 30886, 30905, May 15, 2000, amended this section, effective June 14, 2000.]

**NOTES APPLICABLE TO ENTIRE CHAPTER:**

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

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[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

*United States v Hagberg* (2000, CA9 Mont) 207 F3d 569, 2000 CDOS 2274, 2000 Daily Journal DAR 3083, 50 *Env't Rep Cas* 1380, 30 *ELR* 20436

*Friends of Pinto Creek v United States EPA* (2007, CA9) 504 F3d 1007, 65 *Env't Rep Cas* 1289

*N. Cal. River Watch v City of Healdsburg* (2004, ND Cal) 2004 US Dist LEXIS 1008, aff'd (2006, CA9 Cal) 457 F3d 1023, 62 *Env't Rep Cas* 2089, 36 *ELR* 20163 (criticized in *United States v Johnson* (2006, CA1 Mass) 467 F3d 56, 63 *Env't Rep Cas* 1289, 36 *ELR* 20218) and (criticized in *United States v Cundiff* (2007, WD Ky) 480 F Supp 2d 940) and (criticized in *United States v Fabian* (2007, ND Ind) 2007 US Dist LEXIS 24254) and op withdrawn, reh den, reh, en banc, den (2007, CA9 Cal) 2007 US App LEXIS 18612 and substituted op (2007, CA9 Cal) 2007 US App LEXIS 18615

4338 words

# Exhibit 9



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TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM  
SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

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§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) Permit requirement. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

- (i) A discharge with respect to which a permit has been issued prior to February 4, 1987;
- (ii) A discharge associated with industrial activity (see § 122.26(a)(4));
- (iii) A discharge from a large municipal separate storm sewer system;
- (iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

- (A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.
- (B) The size of the discharge;
- (C) The quantity and nature of the pollutants discharged to waters of the United States; and
- (D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

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(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems. (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.



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(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage at point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

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(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) Definitions. (1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the

interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7)(i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the

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past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE), pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C 552(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460. A copy is also available for inspection at the U.S. EPA Water Docket, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or the Office of the Federal Register, 800 N. Capitol Street N.W. Suite 700, Washington, DC. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE  
OF "STORM WATER DISCHARGES ASSOCIATED WITH SMALL  
CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: Required Nationwide Coverage	. Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. . Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	. Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE  
OF "STORM WATER DISCHARGES ASSOCIATED WITH SMALL  
CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Potential Waiver:	Any automatically designated construction
Waiver from	activity where the operator certifies: (1)
Requirements as	A rainfall erosivity factor of less than
Determined by the NPDES	five, or (2) That the activity will occur
Permitting Authority.	within an area where controls are not
	needed based on a TMDL or, for non-impaired
	waters that do not require a TMDL, an
	equivalent analysis for the pollutant(s) of
	concern. (see § 122.26(b)(15)(i).)

(16) Small municipal separate storm sewer system means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) Small MS4 means a small municipal separate storm sewer system.

(18) Municipal separate storm sewer system means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) MS4 means a municipal separate storm sewer system.

(20) Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runoff or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity -- (1) Individual application. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in § 122.26(c)(1)(ii)-(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

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(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under § 122.21(g)(7) (vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

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(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under § 122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) Part 1. Part 1 of the application shall consist of;

(i) General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) Source identification. (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;



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(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) Discharge characterization. (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents

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(or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced 1/4 mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) Management programs. (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) Fiscal resources. (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, in-

cluding an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) Characterization data. When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with § 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii) (A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD[5]

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD<sub>5</sub>, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

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(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) Storm water discharges associated with industrial activity. (i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

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(i) Part 1. (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) Part 2. (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) Rejected facilities. (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)-(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

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(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

(f) Petitions. (1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.



(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) Conditional exclusion for "no exposure" of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) Qualification. To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to § 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

(iv) Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

(v) Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) Limitations. (i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see § 122.21(b));

- (ii) The facility name and address, the county name and the latitude and longitude where the facility is located;
- (iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:
  - (A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;
  - (B) Materials or residuals on the ground or in storm water inlets from spills/leaks;
  - (C) Materials or products from past industrial activity;
  - (D) Material handling equipment (except adequately maintained vehicles);
  - (E) Materials or products during loading/unloading or transporting activities;
  - (F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);
  - (G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;
  - (H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;
  - (I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);
  - (J) Application or disposal of process wastewater (unless otherwise permitted); and
  - (K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

**HISTORY:** [55 FR 48063, Nov. 16, 1990, as amended at 56 FR 12100, Mar. 21, 1991; 56 FR 56554, Nov. 5, 1991; 57 FR 11412, Apr. 2, 1992; 57 FR 60447, Dec. 18, 1992; 60 FR 40235, Aug. 7, 1995; 64 FR 68722, 68838, Dec. 8, 1999; 65 FR 30886, 30907, May 15, 2000; 68 FR 11325, 11329, Mar. 10, 2003; 70 FR 11560, 11563, Mar. 9, 2005; 71 FR 33628, 33639, June 12, 2006]

**AUTHORITY:** The Clean Water Act, 33 U.S.C. 1251 et seq.

**NOTES:** [EFFECTIVE DATE NOTE: 71 FR 33628, 33639, June 12, 2006, revised paragraphs (a)(2) and (e)(8), effective June 12, 2006.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

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[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Notice of implementation policy, see: *71 FR 25504*, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Findings, see: *74 FR 66496*, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556*, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: *61 FR 41698*, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

*American Mining Congress v United States EPA (1992, CA9) 965 F2d 759, 92 CDOS 4465, 92 Daily Journal DAR 7079, 35 Env't Rep Cas 1032, 22 ELR 21135, 121 OGR 375*

*Env'tl. Def. Ctr., Inc. v EPA (2003, CA9 Cal) 344 F3d 832, 57 Env't Rep Cas 1039, 33 ELR 20269, cert den (2004) 541 US 1085, 124 S Ct 2811, 159 L Ed 2d 246, 59 Env't Rep Cas 1160*

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# Exhibit 10



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\*\*\* THIS SECTION IS CURRENT THROUGH THE SEPTEMBER 8, 2011 \*\*\*  
\*\*\* ISSUE OF THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM  
SUBPART C -- PERMIT CONDITIONS

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*40 CFR 122.41*

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

(2) The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed \$ 25,000 per day for each violation. The Clean Water Act provides that any person who negligently violates sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$ 2,500 to \$ 25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$ 50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$ 5,000 to \$ 50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$ 100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit

condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$ 250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$ 500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$ 1,000,000 and can be fined up to \$ 2,000,000 for second or subsequent convictions.

(3) Any person may be assessed an administrative penalty by the Administrator for violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed \$ 10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$ 25,000. Penalties for Class II violations are not to exceed \$ 10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$ 125,000.

(b) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

(f) Permit actions. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

(i) Inspection and entry. The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

- (1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
- (2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- (3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
- (4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

(j) Monitoring and records. (1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

- (i) The date, exact place, and time of sampling or measurements;
- (ii) The individual(s) who performed the sampling or measurements;
- (iii) The date(s) analyses were performed;
- (iv) The individual(s) who performed the analyses;
- (v) The analytical techniques or methods used; and
- (vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$ 10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$ 20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

(k) Signatory requirement. (1) All applications, reports, or information submitted to the Director shall be signed and certified. (See § 122.22)

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$ 10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(l) Reporting requirements. (1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

- (i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in § 122.29(b); or
- (ii) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under § 122.42(a)(1).

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan;

(2) Anticipated noncompliance. The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) Transfers. This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act. (See § 122.61; in some cases, modification or revocation and reissuance is mandatory.)

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(i) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices.

(ii) If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136, or another method required for an industry-specific waste stream under 40 CFR sub-chapters N or O, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director.

(iii) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(5) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) Twenty-four hour reporting. (i) The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(ii) The following shall be included as information which must be reported within 24 hours under this paragraph.

(A) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.41(g).

(B) Any upset which exceeds any effluent limitation in the permit.

(C) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.44(g).)

(iii) The Director may waive the written report on a case-by-case basis for reports under paragraph (l)(6)(ii) of this section if the oral report has been received within 24 hours.

(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (l) (4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (l)(6) of this section.

(8) Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

(m) Bypass -- (1) Definitions. (i) Bypass means the intentional diversion of waste streams from any portion of a treatment facility.

(ii) Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice -- (i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (l)(6) of this section (24-hour notice).

(4) Prohibition of bypass. (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:



(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

(n) Upset -- (1) Definition. Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (n)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

(4) Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

**HISTORY:** [48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39620, Sept. 1, 1983; 49 FR 38049, Sept. 26, 1984; 50 FR 4514, Jan. 31, 1985; 50 FR 6940, Feb. 19, 1985; 54 FR 255, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 65 FR 30886, 30908, May 15, 2000; 72 FR 11200, 11211, Mar. 12, 2007]

**AUTHORITY:** (Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

**NOTES:** [EFFECTIVE DATE NOTE: 72 FR 11200, 11211, Mar. 12, 2007, revised paragraphs (j)(4), and (l)(4)(ii), effective Apr. 11, 2007.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

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# Exhibit 11



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\*\*\* ISSUE OF THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM  
SUBPART C -- PERMIT CONDITIONS

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§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

(2) Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) Other effluent limitations and standards under sections 301, 302, 303, 307, 318 and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also § 122.41(a).

(2) Standards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) Reopener clause: For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are

not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

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(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See § 122.29(c)).

(e) Technology-based controls for toxic pollutants. Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) Notification level. A "notification level" which exceeds the notification level of § 122.42(a)(1)(i), (ii) or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c)

(g) Twenty-four hour reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under § 122.41(1)(6)(ii)(C) (24-hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Durations for permits, as set forth in § 122.46.

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants or another method is required under 40 CFR subchapters N or O. In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR subchapters N or O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants.

(2) Except as provided in paragraphs (i)(4) and (i)(5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with § 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l) (1), (4), (5), and (6) at least annually.

(j) Pretreatment program for POTWs. Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

NOTE TO PARAGRAPH (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No.



N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. Copies of those documents (or directions on how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260-7786; or the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276-0462. Updates of these documents or additional BMP documents may also be available. A list of EPA BMP guidance documents is available on the OWM Home Page at <http://www.epa.gov/owm>. In addition, States may have BMP guidance documents.

These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(l) Reissued permits. (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions -- A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if --

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) Grants. Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) Sewage sludge. Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.59 of this chapter.

(r) Great Lakes. When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) Qualifying State, Tribal, or local programs. (1) For storm water discharges associated with small construction activity identified in § 122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in § 122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

**HISTORY:** [48 FR 14153, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 49 FR 38049, Sept. 26, 1984; 50 FR 6940, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985; 54 FR 256, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 54 FR 23895, June 2, 1989; 57 FR 11413, Apr. 2, 1992; 57 FR 33049, July 24, 1992; 60 FR 15386, Mar. 23, 1995; 64 FR 42434, 42469, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68847, Dec. 8, 1999; 65 FR 30886, 30908, May 15, 2000; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001; 66 FR 65256, 65337, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 35006, 35040, June 16, 2006; 72 FR 11200, 11212, Mar. 12, 2007]

**AUTHORITY:** The Clean Water Act, 33 U.S.C. 1251 et seq.

**NOTES:** [EFFECTIVE DATE NOTE: 71 FR 35006, 35040, June 16, 2006, revised paragraph (b)(3), effective July 17, 2006; 72 FR 11200, 11212, Mar. 12, 2007, revised paragraph (i)(1)(iv), effective Apr. 11, 2007.]

40 CFR 122.44

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

*Communities for a Better Environment v State Water Resources Control Bd.* (2003, 1st Dist) 109 Cal App 4th 1089, 1 Cal Rptr 3d 76, 2003 CDOS 5149, 2003 Daily Journal DAR 6533, reh den (2003, Cal App 1st Dist) 2003 Cal App LEXIS 1082

*Divers' Environmental Conservation Organization v State Water Resources Control Bd.* (2006, 4th Dist) 145 Cal App 4th 246, 51 Cal Rptr 3d 497, 2006 CDOS 10951, 36 ELR 20237, reh den (2006, Cal App 4th Dist) 2006 Cal App LEXIS 2102

4849 words

# Exhibit 12



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\*\*\* ISSUE OF THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM  
SUBPART C -- PERMIT CONDITIONS

**Go to the CFR Archive Directory**

*40 CFR 122.48*

§ 122.48 Requirements for recording and reporting of monitoring results (applicable to State programs, see § 123.25).

All permits shall specify:

- (a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);
- (b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;
- (c) Applicable reporting requirements based upon the impact of the regulated activity and as specified in § 122.44. Reporting shall be no less frequent than specified in the above regulation.

**HISTORY:** [48 FR 14153, Apr. 1, 1983; 50 FR 6940, Feb. 19, 1985]

**AUTHORITY:** The Clean Water Act, 33 U.S.C. 1251 et seq.

**NOTES:** NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

40 CFR 122.48

103 words

# Exhibit 13



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\*\*\* THIS SECTION IS CURRENT THROUGH THE SEPTEMBER 8, 2011 \*\*\*  
\*\*\* ISSUE OF THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

**Go to the CFR Archive Directory**

*40 CFR 130.2*

§ 130.2 Definitions.

- (a) The Act. The Clean Water Act, as amended, *33 U.S.C. 1251 et seq.*
- (b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.
- (c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- (d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.
- (e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).
- (f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.
- (g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.
- (h) Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.
- (i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If



40 CFR 130.2

Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

**HISTORY:** [50 FR 1779, Jan. 11, 1985, as amended at 54 FR 14359, Apr. 11, 1989; 65 FR 43586, 43662, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

**AUTHORITY:** AUTHORITY NOTE APPLICABLE TO ENTIRE PART:  
33 U.S.C. 1251 et seq.

**NOTES:** NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: 73 FR 52928, Sept. 12, 2008.]

647 words

# Exhibit 14



FEDERAL REGISTER

Vol. 64, No. 235

Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY (EPA)

40 CFR Parts 9, 122, 123, and 124

[FRL--6470-8]

RIN 2040-AC82

**National Pollutant Discharge Elimination System--Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges**

Part II

64 FR 68722

**DATE:** Wednesday, December 8, 1999

**ACTION:** Final rule.

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To view the next page, type .np\* TRANSMIT.  
To view a specific page, transmit p\* and the page number, e.g. p\*1  
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[\*68722]

**SUMMARY:** Today's regulations (Phase II) expand the existing National Pollutant Discharge Elimination System (NPDES) storm water program (Phase I) to address storm water discharges from small municipal separate storm sewer systems (MS4s) (those serving less than 100,000 persons) and construction sites that disturb one to five acres. Although these sources are automatically designated by today's rule, the rule allows for the exclusion of certain sources from the national program based on a demonstration of the lack of impact on water quality, as well as the inclusion of others based on a higher likelihood of localized adverse impact on water quality. Today's regulations also exclude from the NPDES program storm water discharges from industrial facilities that have "no exposure" of industrial activities or materials to storm water. Finally, today's rule extends from August 7, 2001 until March 10, 2003 the deadline by which certain industrial facilities owned by small MS4s must obtain coverage under an NPDES permit. This rule establishes a cost-effective, flexible approach for reducing environmental harm by storm water discharges from many point sources of storm water that are currently unregulated.

EPA believes that the implementation of the six minimum measures identified for small MS4s should significantly reduce pollutants in urban storm water compared to existing levels in a cost-effective manner. Similarly, EPA believes that implementation of Best Management Practices (BMP) controls at small construction sites will also result in a significant reduction in pollutant discharges and an improvement in surface water quality. EPA believes this rule will result in monetized financial, recreational and health benefits, as well as benefits that EPA has been unable to monetize. Expected benefits include reduced scouring and erosion of streambeds, improved aesthetic quality of waters, reduced eu-

trophication of aquatic systems, benefit to wildlife and endangered and threatened species, tourism benefits, biodiversity benefits and reduced costs for siting reservoirs. In addition, the costs of industrial storm water controls will decrease due to the exclusion of storm water discharges from facilities where there is "no exposure" of storm water to industrial activities and materials.

**DATES:** This regulation is effective on February 7, 2000. The incorporation by reference of the rainfall erosivity factor publication listed in the rule is approved by the Director of the Federal Register as of February 7, 2000. For judicial review purposes, this final rule is promulgated as of 1:00 p.m. Eastern Standard Time, on December 22, 1999 as provided in 40 CFR 23.2.

**ADDRESSES:** The complete administrative record for the final rule and the ICR have been established under docket numbers W-97-12 (rule) and W-97-15 (ICR), and includes supporting documentation as well as printed, paper versions of electronic comments. Copies of information in the record are available upon request. A reasonable fee may be charged for copying. The record is available for inspection and copying from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, at the Water Docket, EPA, East Tower Basement, 401 M Street, SW, Washington, DC. For access to docket materials, please call 202/260-3027 to schedule an appointment.

**FOR FURTHER INFORMATION CONTACT:** George Utting, Office of Wastewater Management, Environmental Protection Agency, Mail Code 4203, 401 M Street, SW, Washington, DC 20460; (202) 260-5816; sw2@epa.gov.

**SUPPLEMENTARY INFORMATION:** Entities potentially regulated by this action include:

Category	Examples of regulated entities
Federal, State, Tribal, and Local Governments	Operators of small separate storm sewer systems, industrial facilities that discharge storm water associated with industrial activity or construction activity disturbing 1 to 5 acres.
Industry	Operators of industrial facilities that discharge storm water associated with industrial activity.
Construction Activity	Operators of construction activity disturbing 1 to 5 acres.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility or company is regulated by this action, you should carefully examine the applicability criteria in §§ 122.26(b), 122.31, 122.32, and 123.35 of the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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#### I. Background

##### A. Proposed Rule and Pre-Proposal Outreach

On January 9, 1998 (63 FR 1536), EPA proposed to expand the National Pollutant Discharge Elimination System (NPDES) storm water program to include storm water discharges from municipal separate storm sewer systems (MS4s) and construction sites that were smaller than those previously included in the program. The proposal also addressed industrial sources that have "no exposure" of industrial activities and materials to storm water. Today, EPA is promulgating a final rule to implement most of the proposed revisions with minor changes based on public comments received on the proposal. Today's final rule also extends the deadline by which certain industrial facilities operated by municipalities of less than 100,000 population must be covered by a NPDES permit; the deadline is changed from August 7, 2001 until March 10, 2003.

In 1972, Congress amended the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (CWA)) to prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. The NPDES program is a program designed to track point sources and require the implementation of the controls necessary to minimize the discharge of pollutants. Initial efforts to improve water quality under the NPDES program primarily focused on reducing pollutants in industrial process wastewater and municipal sewage. These discharge sources were easily identified as responsible for poor, often drastically degraded, water quality conditions.

As pollution control measures for industrial process wastewater and municipal sewage were implemented and refined, it became increasingly evident that more diffuse sources of water pollution were also significant causes of water quality impairment. Specifically, storm water runoff draining large surface areas, such as agricultural and urban land, was found to be a major cause of water quality impairment, including the nonattainment of designated beneficial uses.



In 1987, Congress amended the CWA to require implementation, in two phases, of a comprehensive national program for addressing storm water discharges. The first phase of the program, commonly referred to as "Phase I," was promulgated on November 16, 1990 (55 FR 47990). Phase I requires NPDES permits for storm water discharge from a large number of priority sources including municipal separate storm sewer systems ("MS4s") generally serving populations of 100,000 or more and several categories of industrial activity, including construction sites that disturb five or more acres of land.

Today's rule, which is the second phase of the storm water program, expands the existing program to include discharges of storm water from smaller municipalities in urbanized areas and from construction sites that disturb between one and five acres of land. Today's rule allows certain sources to be excluded from the national program based on a demonstrable lack of impact on water quality. The rule also allows other sources not automatically regulated on a national basis to be designated for inclusion based on increased likelihood for localized adverse impact on water quality. [\*68724] Today's rule also conditionally excludes storm water discharges from industrial facilities that have "no exposure" of industrial activities or materials to storm water. Today's rule and the effort that led to its development are commonly referred to as "Phase II." On August 7, 1995, EPA promulgated a final rule that required facilities to be regulated under Phase II to apply for a NPDES permit by August 7, 2001, unless the NPDES permitting authority designates them as requiring a permit by an earlier date. (60 FR 40230). That rule is referred to as "the Interim Phase II Rule." Today's rule replaces the Interim Phase II rule.

EPA performed extensive outreach and worked with a variety of stakeholders prior to proposing today's rule. On September 9, 1992, EPA published a notice requesting information and public comment on how to prepare regulations under CWA section 402(p)(6) (see 57 FR 41344). The notice identified three sets of issues associated with developing new NPDES storm water regulations: (1) How should EPA identify unregulated sources of storm water to protect water quality, (2) what types of control strategies should EPA develop for these sources, and (3) what are appropriate deadlines for implementing new requirements. The notice recognized that potential sources for coverage under the section 402(p)(6) regulations would fall into two main categories: municipal separate storm sewer systems and individual (commercial and residential) sources. EPA received more than 130 comments on the September 9, 1992, notice. For further discussion of the comments received, see *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System: Report to Congress* (EPA, 1995a), pp. 1-21 to 1-22, and Appendix J (which provides a detailed summary of the comments received as they relate to the specific issues raised in the notice).

In early 1993, the Rensselaerville Institute and EPA held public and expert meetings to assist in developing and analyzing options for identifying unregulated sources and possible controls. The report on the 1993 meetings identified two options that were favored by the various groups that participated. One option was a program that allowed States to select sources to be controlled in a manner consistent with criteria developed by EPA. A second option was a tiered approach under which EPA would select high priority sources for control by NPDES permits and States would select other sources for control under a State water quality program other than the NPDES program. For additional details see the "Report on the EPA Storm Water Management Program (Rensselaerville Study)," Appendix I of *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System: Report to Congress* (EPA, 1995a).

EPA also conducted outreach with representatives of small entities in conjunction with the convening of a Small Business Advocacy Review Panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA). This process is discussed in section IV.E of today's preamble. For additional background see the discussion in the preamble to the proposal for today's rule.

To assist EPA by providing advice and recommendations regarding the urban municipal wet weather water pollution control program, EPA established the Urban Wet Weather Flows Federal Advisory Committee (hereinafter, "FACA Committee") under the Federal Advisory Committee Act (FACA). The Office of Management and Budget approved the charter for the FACA Committee on March 10, 1995. The FACA Committee provided a forum for identifying and addressing issues associated with water quality impacts from storm water sources.

The FACA Committee established two subcommittees: the Storm Water Phase II FACA Subcommittee and the Sanitary Sewer Overflows (SSOs) FACA Subcommittee. Consistent with the requirements of FACA, the membership of both the FACA Committee and the subcommittees was balanced among EPA's various outside stakeholder interests, including representatives from municipalities, States, Indian Tribes, EPA, industrial and commercial sectors, agriculture, and environmental and public interest groups.

The Storm Water Phase II FACA Subcommittee ("Subcommittee") met fourteen times between September 1995 and June 1998. The 32 Subcommittee members discussed possible regulatory frameworks at these meetings as well as during numerous other meetings and conference calls. Members of the FACA Committee provided views regarding the development of the "no exposure" provision and other provisions in drafts of the Phase II rule. EPA provided Subcommittee members with four successive drafts of the proposed rule and preamble, outlines of the rule, summaries of the written comments received on each draft, and documents identifying the changes made to each draft. In the course of providing input to the Committee, individual Subcommittee members provided significant input and advice that EPA considered in the context of public comments received. Ultimately, the Subcommittee did not provide a written report back to the FACA Committee, and the FACA Committee did not provide written advice and recommendations to EPA. The Agency, therefore, did not rely on group recommendations in developing today's rule, but does consider the process to have resulted in important public outreach.

#### *B. Water Quality Concerns/Environmental Impact Studies and Assessments*

Storm water runoff from lands modified by human activities can harm surface water resources and, in turn, cause or contribute to an exceedance of water quality standards by changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitat, and elevating pollutant concentrations and loadings. Such runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorous and nitrogen), heavy metals and other toxic pollutants, pathogens, toxins, oxygen-demanding substances (organic material), and floatables (U.S. EPA. 1992. *Environmental Impacts of Storm Water Discharges: A National Profile*. EPA 841-R-92-001. Office of Water. Washington, DC). After a rain, storm water runoff carries these pollutants into nearby streams, rivers, lakes, estuaries, wetlands, and oceans. The highest concentrations of these contaminants often are contained in "first flush" discharges, which occur during the first major storm after an extended dry period (Schueler, T.R. 1994. "First Flush of Stormwater Pollutants Investigated in Texas." Note 28. *Watershed Protection Techniques* 1(2)). Individually and combined, these pollutants impair water quality, threatening designated beneficial uses and causing habitat alteration or destruction.

Uncontrolled storm water discharges from areas of urban development and construction activity negatively impact receiving waters by changing the physical, biological, and chemical composition of the water, resulting in an unhealthy environment for aquatic organisms, wildlife, and humans. The following sections discuss the studies and data that address and support this finding.

Although water quality problems also can occur from agricultural storm water discharges and return flows from irrigated agriculture, this area of [\*68725] concern is statutorily exempted from regulation as a point source under the Clean Water Act and is not discussed here. (See CWA section 502(14)). Other storm water sources not specifically identified in the regulations may be of concern in certain areas and can be addressed on a case-by-case (or category-by-category) basis through the NPDES designation authority preserved by CWA section 402(p)(2)(6), as well as today's rule.

##### **1. Urban Development**

Urbanization alters the natural infiltration capability of the land and generates a host of pollutants that are associated with the activities of dense populations, thus causing an increase in storm water runoff volumes and pollutant loadings in storm water discharged to receiving waterbodies (U.S. EPA, 1992). Urban development increases the amount of impervious surface in a watershed as farmland, forests, and meadowlands with natural infiltration characteristics are converted into buildings with rooftops, driveways, sidewalks, roads, and parking lots with virtually no ability to absorb storm water. Storm water and snow-melt runoff wash over these impervious areas, picking up pollutants along the way while gaining speed and volume because of their inability to disperse and filter into the ground. What results are storm water flows that are higher in volume, pollutants, and temperature than the flows in less impervious areas, which have more natural vegetation and soil to filter the runoff (U.S. EPA, 1997. *Urbanization and Streams: Studies of Hydrologic Impacts*. EPA 841-R-97-009. Office of Water. Washington, DC).

Studies reveal that the level of imperviousness in an area strongly correlates with the quality of the nearby receiving waters. For example, a study in the Puget Sound lowland ecoregion found that when the level of basin development exceeded 5 percent of the total impervious area, the biological integrity and physical habitat conditions that are necessary to support natural biological diversity and complexity declined precipitously (May, C.W., E.B. Welch, R.R. Horner, J.R. Karr, and B.W. May. 1997. *Quality Indices for Urbanization Effects in Puget Sound Lowland Streams*, Technical Report No. 154. University of Washington Water Resources Series). Research conducted in numerous geo-

graphical areas, concentrating on various variables and employing widely different methods, has revealed a similar conclusion: stream degradation occurs at relatively low levels of imperviousness, such as 10 to 20 percent (even as low as 5 to 10 percent according to the findings of the Washington study referenced above) (Schueler, T.R. 1994. "The Importance of Imperviousness." *Watershed Protection Techniques* 1(3); May, C., R.R. Horner, J.R. Karr, B.W. Mar, and E.B. Welch. 1997. "Effects Of Urbanization On Small Streams In The Puget Sound Lowland Ecoregion." *Watershed Protection Techniques* 2(4); Yoder, C.O., R.J. Miltner, and D. White. 1999. "Assessing the Status of Aquatic Life Designated Uses in Urban and Suburban Watersheds." In *Proceedings: National Conference on Retrofits Opportunities in Urban Environments*. EPA 625-R-99-002, Washington, DC; Yoder, C.O and R.J. Miltner. 1999. "Assessing Biological Quality and Limitations to Biological Potential in Urban and Suburban Watersheds in Ohio." In *Comprehensive Stormwater & Aquatic Ecosystem Management Conference Papers*, Auckland, New Zealand). Furthermore, research has indicated that few, if any, urban streams can support diverse benthic communities at imperviousness levels of 25 percent or more. An area of medium density single family homes can be anywhere from 25 percent to nearly 60 percent impervious, depending on the design of the streets and parking (Schueler, 1994).

In addition to impervious areas, urban development creates new pollution sources as population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, pet waste, litter, pesticides, and household hazardous wastes, which may be washed into receiving waters by storm water or dumped directly into storm drains designed to discharge to receiving waters. More people in less space results in a greater concentration of pollutants that can be mobilized by, or disposed into, storm water discharges from municipal separate storm sewer systems. A modeling system developed for the Chesapeake Bay indicated that contamination of the Bay and its tributaries from runoff is comparable to, if not greater than, contamination from industrial and sewage sources (Cohn-Lee, R. and D. Cameron. 1992. "Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation." *The Environmental Professional*, Vol. 14).

#### a. Large-Scale Studies and Assessments

In support of today's regulatory designation of MS4s in urbanized areas, the Agency relied on broad-based assessments of urban storm water runoff and related water quality impacts, as well as more site-specific studies. The first national assessment of urban runoff characteristics was completed for the *Nationwide Urban Runoff Program (NURP)* study (U.S. EPA. 1983. *Results of the Nationwide Urban Runoff Program, Volume 1-Final Report*. Office of Water. Washington, D.C.). The NURP study is the largest nationwide evaluation of storm water discharges, which includes adverse impacts and sources, undertaken to date.

EPA conducted the NURP study to facilitate understanding of the nature of urban runoff from residential, commercial, and industrial areas. One objective of the study was to characterize the water quality of discharges from separate storm sewer systems that drain residential, commercial, and light industrial (industrial parks) sites. Storm water samples from 81 residential and commercial properties in 22 urban/suburban areas nationwide were collected and analyzed during the 5-year period between 1978 and 1983. The majority of samples collected in the study were analyzed for eight conventional pollutants and three heavy metals.

Data collected under the NURP study indicated that discharges from separate storm sewer systems draining runoff from residential, commercial, and light industrial areas carried more than 10 times the annual loadings of total suspended solids (TSS) than discharges from municipal sewage treatment plants that provide secondary treatment. The NURP study also indicated that runoff from residential and commercial areas carried somewhat higher annual loadings of chemical oxygen demand (COD), total lead, and total copper than effluent from secondary treatment plants. Study findings showed that fecal coliform counts in urban runoff typically range from tens to hundreds of thousands per hundred milliliters of runoff during warm weather conditions, with the median for all sites being around 21,000/100 ml. This is generally consistent with studies that found that fecal coliform mean values range from 1,600 coliform fecal units (CFU)/100 ml to 250,000 cfu/100 ml (Makepeace, D.K., D.W. Smith, and S.J. Stanley. 1995. "Urban Storm Water Quality: Summary of Contaminant Data." *Critical Reviews in Environmental Science and Technology* 25(2):93-139). Makepeace, et al., summarized ranges of contaminants from storm water, including physical contaminants such as total solids (76-36,200 mg/L) and copper (up to 1.41 mg/L); organic chemicals; organic compounds, such as oil and grease (up to 110 mg/L); and microorganisms. [\*68726]

Monitoring data summarized in the NURP study provided important information about urban runoff from residential, commercial, and light industrial areas. The study concluded that the quality of urban runoff can be affected adversely by several sources of pollution that were not directly evaluated in the study, including illicit discharges, construction site runoff, and illegal dumping. Data from the NURP study were analyzed further in the U.S. Geological Sur-

vey (USGS) Urban Storm Water Data Base for 22 Metropolitan Areas Throughout the United States study (Driver, N.E., M.H. Mustard, R.B. Rhinesmith, and R.F. Middleburg. 1985. *U.S. Geological Survey Urban Storm Water Data Base for 22 Metropolitan Areas Throughout the United States*. Report No. 85-337 USGS. Lakewood, CO). The USGS report summarized additional monitoring data compiled during the mid-1980s, covering 717 storm events at 99 sites in 22 metropolitan areas and documented problems associated with metals and sediment concentrations in urban storm water runoff. More recent reports have confirmed the pollutant concentration data collected in the NURP study (Marsalek, J. 1990. "Evaluation of Pollutant Loads from Urban Nonpoint Sources." *Wat. Sci. Tech.* 22(10/11):23-30; Makepeace, et al., 1995).

Commenters argued that the NURP study does not support EPA's contention that urban activities significantly jeopardize attainment of water quality standards. One commenter argued that the NURP study and the 1985 USGS study are seriously out of date. Because they were issued 10 years or more before the implementation of the current storm water permit program, the data in those reports do not reflect conditions that exist after implementation of permits issued by authorized States and EPA for storm water from construction sites, large municipalities, and industrial activities.

In response, EPA notes that it is not relying solely on the NURP study to describe current water quality impairment. Rather, EPA is citing NURP as a source of data on typical pollutant concentrations in urban runoff. Recent studies have not found significantly different pollutant concentrations in urban runoff when compared to the original NURP data (see Makepeace, et al., 1995; Marsalek, 1990; and Pitt, et al., 1995).

America's Clean Water-the States' Nonpoint Source Assessment (Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). 1985. *America's Clean Water-The States' Nonpoint Source Assessment*. Prepared in cooperation with the U.S. EPA, Office of Water, Washington, DC), a comprehensive study of diffuse pollution sources conducted under the sponsorship of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and EPA revealed that 38 States reported urban runoff as a major cause of designated beneficial use impairment and 21 States reported storm water runoff from construction sites as a major cause of beneficial use impairment. In addition, the 1996 305(b) Report (U.S. EPA. 1998. *The National Water Quality Inventory, 1996 Report to Congress*. EPA 841-R-97-008. Office of Water. Washington, DC), provides a national assessment of water quality based on biennial reports submitted by the States as required under CWA section 305(b) of the CWA. In the CWA 305(b) reports, States, Tribes, and Territories assess their individual water quality control programs by examining the attainment or nonattainment of the designated uses assigned to their rivers, lakes, estuaries, wetlands, and ocean shores. A designated use is the legally applicable use specified in a water quality standard for a watershed, waterbody, or segment of a waterbody. The designated use is the desirable use that the water quality should support. Examples of designated uses include drinking water supply, primary contact recreation (swimming), and aquatic life support. Each CWA 305(b) report indicates the assessed fraction of a State's waters that are fully supporting, partially supporting, or not supporting designated beneficial uses.

In their reports, States, Tribes, and Territories first identified and then assigned the sources of water quality impairment for each impaired waterbody using the following categories: industrial, municipal sewage, combined sewer overflows, urban runoff/storm sewers, agricultural, silvicultural, construction, resource extraction, land disposal, hydrologic modification, and habitat modification. The 1996 Inventory, based on a compilation of 60 individual 305(b) reports submitted by States, Tribes, and Territories, assessed the following percentages of total waters nationwide: 19 percent of river and stream miles; 40 percent of lake, pond, and reservoir acres; 72 percent of estuary square miles; and 6 percent of ocean shoreline waters. The 1996 Inventory indicated that approximately 40 percent of the Nation's assessed rivers, lakes, and estuaries are impaired. Waterbodies deemed as "impaired" are either partially supporting designated uses or not supporting designated uses.

The 1996 Inventory also found urban runoff/discharges from storm sewers to be a major source of water quality impairment nationwide. Urban runoff/storm sewers were found to be a source of pollution in 13 percent of impaired rivers; 21 percent of impaired lakes, ponds, and reservoirs; and 45 percent of impaired estuaries (second only to industrial discharges). In addition, urban runoff was found to be the leading cause of ocean impairment for those ocean miles surveyed.

In addition, a recent USGS study of urban watersheds across the United States has revealed a link between urban development and contamination of local waterbodies. The study found the highest levels of organic contaminants, known as polycyclic aromatic hydrocarbons (PAHs) (products of combustion of wood, grass, and fossil fuels), in the reservoirs of urbanized watersheds (U.S. Geological Survey (USGS). 1998. *Research Reveals Link Between Develop-*

*ment and Contamination in Urban Watersheds*. USGS news release. USGS National Water-Quality Assessment Program).

Urban storm water also can contribute significant amounts of toxicants to receiving waters. Pitt, et. al. (1993), found heavy metal concentrations in the majority of samples analyzed. Industrial or commercial areas were likely to be the most significant pollutant source areas (Pitt, R., R. Field, M. Lalor, M. Brown 1993. "Urban stormwater toxic pollutants: assessment, sources, and treatability" *Water Environment Research*, 67(3):260-75).

#### b. Local and Watershed-Based Studies

In addition to the large-scale nationwide studies and assessments, a number of local and watershed-based studies from across the country have documented the detrimental effects of urban storm water runoff on water quality. A study of urban streams in Milwaukee County, Wisconsin, found local streams to be highly degraded due primarily to urban runoff, while three studies in the Atlanta, Georgia, region were characterized as being "the first documentation in the Southeast of the strong negative relationship between urbanization and stream quality that has been observed in other ecoregions" (Masterson, J. and R. Bannerman. 1994. "Impacts of Storm Water Runoff on Urban Streams in Milwaukee County, Wisconsin." Paper presented at National Symposium on Water Quality: American Water Resources Association; Schueler, T.R. 1997. "Fish Dynamics in Urban Streams Near Atlanta, Georgia." [\*68727] Technical Note 94. *Watershed Protection Techniques* 2(4)). Several other studies, including those performed in Arizona (Maricopa County), California (San Jose's Coyote Creek), Massachusetts (Green River), Virginia (Tuckahoe Creek), and Washington (Puget Sound lowland ecoregion), all had the same finding: runoff from urban areas greatly impair stream ecology and the health of aquatic life; the more heavily developed the area, the more detrimental the effects (Lopes, T. and K. Fossum. 1995. "Selected Chemical Characteristics and Acute Toxicity of Urban Stormwater, Streamflow, and Bed Material, Maricopa County, Arizona." *Water Resources Investigations Report* 95-4074. USGS; Pitt, R. 1995. "Effects of Urban Runoff on Aquatic Biota." In *Handbook of Ecotoxicology*; Pratt, J. and R. Coler. 1979. "Ecological Effects of Urban Stormwater Runoff on Benthic Macroinvertebrates Inhabiting the Green River, Massachusetts." Completion Report Project No. A-094. Water Resources Research Center. University of Massachusetts at Amherst.; Schueler, T.R. 1997. "Historical Change in a Warmwater Fish Community in an Urbanizing Watershed." Technical Note 93. *Watershed Protection Techniques* 2(4); May, C., R. Horner, J. Karr, B. Mar, and E. Welch. 1997. "Effects Of Urbanization On Small Streams In The Puget Sound Lowland Ecoregion." *Watershed Protection Techniques* 2(4)).

Pitt and others also described the receiving water effects on aquatic organisms associated with urban runoff (Pitt, R.E. 1995. "Biological Effects of Urban Runoff Discharges" In *Stormwater Runoff and Receiving Systems: Impact, Monitoring, and Assessment*, ed. E.E Herricks, Lewis Publishers; Crunkilton, R., J. Kleist, D. Bierman, J. Ramcheck, and W. DeVita. 1999. "Importance of Toxicity as a Factor Controlling the Distribution of Aquatic Organisms in an Urban Stream." In *Comprehensive Stormwater & Aquatic Ecosystem Management Conference Papers*. Auckland, New Zealand).

In Wisconsin, runoff samples were collected from streets, parking lots, roofs, driveways, and lawns. Source areas were broken up into residential, commercial, and industrial. Geometric mean concentration data for residential areas included total solids of about 500-800 mg/L from streets and 600 mg/L from lawns. Fecal coliform data from residential areas ranged from 34,000 to 92,000 cfu/100 mL for streets and driveways. Contaminant concentration data from commercial and industrial source areas were lower for total solids and fecal coliform, but higher for total zinc (Bannerman, R.T., D.W. Owens, R.B. Dods, and N.J. Hornewer. 1993. "Sources of Pollutants in Wisconsin Stormwater." *Wat. Sci. Tech.* 28(3-5):241-59).

Bannerman, et al. also found that streets contribute higher loads of pollutants to urban storm water than any other residential development source. Two small urban residential watersheds were evaluated to determine that lawns and streets are the largest sources of total and dissolved phosphorus in the basins (Waschbusch, R.J., W.R. Selbig, and R.T. Bannerman. 1999. "Sources of Phosphorus in Stormwater and Street Dirt from Two Urban Residential Basins In Madison, Wisconsin, 1994-95." *Water Resources Investigations Report* 99-4021. U.S. Geological Survey). A number of other studies have indicated that urban roadways often contain significant quantities of metal elements and solids (Sansalone, J.J. and S.G. Buchberger. 1997. "Partitioning and First Flush of Metals in Urban Roadway Storm Water." *ASCE Journal of Environmental Engineering* 123(2); Sansalone, J.J., J.M. Koran, J.A. Smithson, and S.G. Buchberger. 1998. "Physical Characteristics of Urban Roadway Solids Transported During Rain Events" *ASCE Journal of Environmental Engineering* 124(5); Klein, L.A., M. Lang, N. Nash, and S.L. Kirschner. 1974. "Sources of Metals in New York City Wastewater" *J. Water Pollution Control Federation* 46(12):2653-62; Barrett, M.E, R.D. Zuber, E.R. Collins, J.F. Malina, R.J. Charbeneau, and G.H Ward., 1993. "A Review and Evaluation of Literature Pertaining to the Quantity and

Control of Pollution from Highway Runoff and Construction." Research Report 1943-1. Center for Transportation Research, University of Texas, Austin).

c. Beach Closings/Advisories

Urban wet weather flows have been recognized as the primary sources of estuarine pollution in coastal communities. Urban storm water runoff, sanitary sewer overflows, and combined sewer overflows have become the largest causes of beach closings in the United States in the past three years. Storm water discharges from urban areas not only pose a threat to the ecological environment, they also can substantially affect human health. A survey of coastal and Great Lakes communities reports that in 1998, more than 1,500 beach closings and advisories were associated with storm water runoff (Natural Resources Defense Council. 1999. "A Guide to Water Quality at Vacation Beaches" New York, NY). Other reports also document public health, shellfish bed, and habitat impacts from storm water runoff, including more than 823 beach closings/advisories issued in 1995 and more than 407 beach closing/advisories issued in 1996 due to urban runoff (Natural Resources Defense Council. 1996. *Testing the Waters Volume VI: Who Knows What You're Getting Into*. New York, NY; NRDC. 1997. *Testing the Waters Volume VII: How Does Your Vacation Beach Rate*. New York, NY; Morton, T. 1997. *Draining to the Ocean: The Effects of Stormwater Pollution on Coastal Waters*. American Oceans Campaign, Santa Monica, CA). The Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay (Haile, R.W., et. al. 1996. "An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay." *Final Report prepared for the Santa Monica Bay Restoration Project*) concluded that there is a 57 percent higher rate of illness in swimmers who swim adjacent to storm drains than in swimmers who swim more than 400 yards away from storm drains. This and other studies document a relationship between gastrointestinal illness in swimmers and water quality, the latter of which can be heavily compromised by polluted storm water discharges.

2. Non-Storm Water Discharges Through Municipal Storm Sewers

Studies have shown that discharges from MS4s often include wastes and wastewater from non-storm water sources. Federal regulations (§ 122.26(b)(2)) define an illicit discharge as "any discharge to an MS4 that is not composed entirely of storm water," with some exceptions. These discharges are "illicit" because municipal storm sewer systems are not designed to accept, process, or discharge such wastes. Sources of illicit discharges include, but are not limited to: sanitary wastewater; effluent from septic tanks; car wash, laundry, and other industrial wastewaters; improper disposal of auto and household toxics, such as used motor oil and pesticides; and spills from roadway and other accidents.

Illicit discharges enter the system through either direct connections (e.g., wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (e.g., infiltration into the MS4 from cracked sanitary systems, spills collected by drain outlets, and paint or used oil dumped directly into a drain). The result is untreated discharges that contribute high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses and bacteria into receiving waterbodies. The NURP study, discussed earlier, found that pollutant levels from illicit discharges were high enough to significantly degrade receiving water quality and threaten aquatic, wildlife, and human health. The study noted particular problems with illicit discharges of sanitary wastes, which can be directly linked to high bacterial counts in receiving waters and can be dangerous to public health.

Because illicit discharges to MS4s can create severe widespread contamination and water quality problems, several municipalities and urban counties performed studies to identify and eliminate such discharges. In Michigan, the Ann Arbor and Ypsilanti water quality projects inspected 660 businesses, homes, and other buildings and identified 14 percent of the buildings as having improper storm sewer drain connections. The program assessment revealed that, on average, 60 percent of automobile-related businesses, including service stations, automobile dealerships, car washes, body shops, and light industrial facilities, had illicit connections to storm sewer drains. The program assessment also showed that a majority of the illicit discharges to the storm sewer system resulted from improper plumbing and connections, which had been approved by the municipality when installed (Washtenaw County Statutory Drainage Board. 1987. Huron River Pollution Abatement Program).

In addition, an inspection of urban storm water outfalls draining into Inner Grays, Washington, indicated that 32 percent of these outfalls had dry weather flows. Of these flows, 21 percent were determined to have pollutant levels higher than the pollutant levels expected in typical urban storm water runoff characterized in the NURP study (U.S. EPA. 1993. *Investigation of Inappropriate Pollutant Entries Into Storm Drainage Systems-A User's Guide*. EPA 600/R-92/238. Office of Research and Development. Washington, DC). That same document reports a study in Toronto, Can-

ada, that found that 59 percent of outfalls from the MS4 had dry-weather flows. Chemical tests revealed that 14 percent of these dry-weather flows were determined to be grossly polluted.

Inflows from aging sanitary sewer collection systems are one of the most serious illicit discharge-related problems. Sanitary sewer systems frequently develop leaks and cracks, resulting in discharges of pollutants to receiving waters through separate storm sewers. These pollutants include sanitary waste and materials from sewer main construction (e.g., asbestos cement, brick, cast iron, vitrified clay). Municipalities have long recognized the reverse problem of storm water infiltration into sanitary sewer collection systems; this type of infiltration often disrupts the operation of the municipal sewage treatment plant.

The improper disposal of materials is another illicit discharge-related problem that can result in contaminated discharges from separate storm sewer systems in two ways. First, materials may be disposed of directly in a catch basin or other storm water conveyance. Second, materials disposed of on the ground may either drain directly to a storm sewer or be washed into a storm sewer during a storm event. Improper disposal of materials to street catch basins and other storm sewer inlets often occurs when people mistakenly believe that disposal to such areas is an environmentally sound practice. Part of the confusion may occur because some areas are served by combined sewer systems, which are part of the sanitary sewer collection system, and people assume that materials discharged to a catch basin will reach a municipal sewage treatment plant. Materials that are commonly disposed of improperly include used motor oil; household toxic materials; radiator fluids; and litter, such as disposable cups, cans, and fast-food packages. EPA believes that there has been increasing success in addressing these problems through initiatives such as storm drain stenciling and recycling programs, including household hazardous waste special collection days.

Programs that reduce illicit discharges to separate storm sewers have improved water quality in several municipalities. For example, Michigan's Huron River Pollution Abatement Program found the elimination of illicit connections caused a measurable improvement in the water quality of the Washtenaw County storm sewers and the Huron River (Washtenaw County Statutory Drainage Board, 1987). In addition, an illicit detection and remediation program in Houston, Texas, has significantly improved the water quality of Buffalo Bayou. Houston estimated that illicit flows from 132 sources had a flow rate as high as 500 gal/min. Sources of the illicit discharges included broken and plugged sanitary sewer lines, illicit connections from sanitary lines to storm sewer lines, and floor drain connections (Glanton, T., M.T. Garrett, and B. Goloby. 1992. *The Illicit Connection: Is It the Problem?* *Wat. Env. Tech.* 4(9):63-8).

### 3. Construction Site Runoff

Storm water discharges generated during construction activities can cause an array of physical, chemical, and biological water quality impacts. Specifically, the biological, chemical, and physical integrity of the waters may become severely compromised. Water quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems (Novotny, V. and G. Chesters. 1989. "Delivery of Sediment and Pollutants from Nonpoint Sources: A Water Quality Perspective." *Journal of Soil and Water Conservation*, 44(6):568-76). Estimates indicate that 80 percent of the phosphorus and 73 percent of the Kjeldahl nitrogen in streams is associated with eroded sediment (U.S. Department of Agriculture. 1989. "The Second RCA Appraisal, Soil, Water and Related Resources on Nonfederal Land in the United States, Analysis of Condition and Trends." Cited in Fennessey, L.A.J., and A.R. Jarrett. 1994. "The Dirt in a Hole: a Review of Sedimentation Basins for Urban Areas and Construction Sites." *Journal of Soil and Water Conservation*, 49(4):317-23).

In watersheds experiencing intensive construction activity, the localized impacts of water quality may be severe because of high pollutant loads, primarily sediments. Siltation is the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes (U.S. EPA, 1998). The 1996 305(b) report also found that construction site discharges were a source of pollution in: 6 percent of impaired rivers; 11 percent of impaired lakes, ponds, and reservoirs; and 11 percent of impaired estuaries. Introduction of coarse sediment (coarse sand or larger) or a large amount of fine sediment is also a concern because of the potential of filling lakes and reservoirs (along with the associated remediation costs for dredging), as well as clogging stream channels (e.g., Paterson, R.G., M.I. Luger, E.J. Burby, E.J. Kaiser, H.R. Malcolm, and A.C. Beard. 1993. "Costs and Benefits of Urban Erosion and Sediment Control: North Carolina Experience." *Environmental Management* 17(2):167-78). Large inputs of coarse sediment into [\*68729] stream channels initially will reduce stream depth and minimize habitat complexity by filling in pools (U.S. EPA. 1991. *Monitoring Guidelines to Evaluate Effects of Forestry Activities on Streams in the Pacific Northwest and Alaska*. EPA 910/9-91-001. Seattle, WA). In addition, studies have shown that stream reaches affected by construction activities of-

ten extend well downstream of the construction site. For example, between 4.8 and 5.6 kilometers of stream below construction sites in the Patuxent River watershed were observed to be impacted by sediment inputs (Fox, H.L. 1974. "Effects of Urbanization on the Patuxent River, with Special Emphasis on Sediment Transport, Storage, and Migration." Ph.D. dissertation. Johns Hopkins University, Baltimore, MD. As Cited in Klein, R.D. 1979. "Urbanization and Stream Quality Impairment." *Water Resources Bulletin* 15(4): 948-63).

A primary concern at most construction sites is the erosion and transport process related to fine sediment because rain splash, rills (i.e., a channel small enough to be removed by normal agricultural practices and typically less than 1-foot deep), and sheetwash encourage the detachment and transport of this material to waterbodies (Storm Water Quality Task Force. 1993. *California Storm Water Best Management Practice Handbooks-Construction Activity*. Oakland, CA: Blue Print Service). Construction sites also can generate other pollutants associated with onsite wastes, such as sanitary wastes or concrete truck washout.

Although streams and rivers naturally carry sediment loads, erosion from construction sites and runoff from developed areas can elevate these loads to levels well above those in undisturbed watersheds. It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use (Novotny, V. and H. Olem. 1994. *Water Quality: Prevention, Identification, and Management of Diffuse Pollution*. New York: Van Nostrand Reinhold). Results from both field studies and erosion models indicate that erosion rates from construction sites are typically an order of magnitude larger than row crops and several orders of magnitude greater than rates from well-vegetated areas, such as forests or pastures (USDA. 1970. "Controlling Erosion on Construction Sites." *Agriculture Information Bulletin*, Washington, DC; Meyer, L.D., W.H. Wischmeier, and W.H. Daniel. 1971. "Erosion, Runoff and Revegetation of Denuded Construction Sites." *Transactions of the ASAE* 14(1):138-41; Owen, O.S. 1975. *Natural Resource Conservation*. New York: MacMillan. As cited in Paterson, et al., 1993).

A recent review of the efficiency of sediment basins indicated that inflows from 12 construction sites had a mean TSS concentration of about 4,500 mg/L (Brown, W.E. 1997. "The Limits of Settling." Technical Note No. 83. *Watershed Protection Techniques* 2(3)). In Virginia, suspended sediment concentrations from housing construction sites were measured at 500-3,000 mg/L, or about 40 times larger than the concentrations from already-developed urban areas (Kuo, C.Y. 1976. "Evaluation of Sediment Yields Due to Urban Development." Bulletin No. 98. Virginia Water Resources Research Center, Virginia Polytechnic Institute and State University, Blacksburg, VA).

Similar impacts from storm water runoff have been reported in a number of other studies. For example, Daniel, et al., monitored three residential construction sites in southeastern Wisconsin and determined that annual sediment yields were more than 19 times the yields from agricultural areas (Daniel, T.C., D. McGuire, D. Stoffel, and B. Miller. 1979. "Sediment and Nutrient Yield from Residential Construction Sites" *Journal of Environmental Quality* 8(3):304-08). Daniel, et al., identified total storm runoff, followed by peak storm runoff, as the most influential factors controlling the sediment loadings from residential construction sites. Daniel, et al., also found that suspended sediment concentrations were 15,000-20,000 mg/L in moderate events and up to 60,000 mg/L in larger events.

Wolman and Schick (Wolman, M.G. and A.P. Schick. 1967. "Effects of Construction on Fluvial Sediment, Urban and Suburban Areas of Maryland." *Water Resources Research* 3(2): 451-64) studied the impacts of development on fluvial systems in Maryland and determined that sediment yields in areas undergoing construction were 1.5 to 75 times greater than detected in natural or agricultural catchments. The authors summarize the potential impacts of construction on sediment yields by stating that "the equivalent of many decades of natural or even agricultural erosion may take place during a single year from areas cleared for construction" (Wolman and Schick, 1967).

A number of studies have examined the effects of road construction on erosion rates and sediment yields. A highway construction project in West Virginia disturbed only 4.2 percent of a 4.72-square-mile basin, but resulted in a three-fold increase in suspended sediment yields (Downs, S.C. and D.H. Appel. 1986. *Progress Report on the Effects of Highway Construction on Suspended-Sediment Discharge in the Coal River and Trace Fork, West Virginia, 1975-81*. USGS Water Resources Investigations Report 84-4275. Charlestown, WV). During the largest storm event, it was estimated that 80 percent of the sediment in the stream originated from the construction site. As is often the case, the increase in suspended sediment load could not be detected further downstream, where the drainage area was more than 50 times larger (269 square miles).

Another study evaluated the effect of 290 acres of highway construction on watersheds ranging in size from 5 to 38 square miles. Suspended sediment loads in the smallest watershed increased by 250 percent, and the estimated sediment yield from the construction area was 37 tons/acre during a 2-year period (Hainly, R.A. 1980. *The Effects of Highway Construction on Sediment Discharge into Blockhouse Creek and Stream Valley Run, Pennsylvania*. USGS Water Re-



sources Investigations Report 80-68. Harrisburg, PA). A more recent study in Hawaii showed that highway construction increased suspended sediment loads by 56 to 76 percent in three small (1 to 4 square mile) basins (Hill, B.R. 1996. *Streamflow and Suspended-Sediment Loads Before and During Highway Construction, North Halawa, Haiku, and Kamooolii Drainage Basins, Oahu, Hawaii, 1983-91*. USGS Water Resources Investigations Report 96-4259. Honolulu, HI). A 1970 study determined that sediment yields from construction areas can be as much as 500 times the levels detected in rural areas (National Association of Counties Research Foundation. 1970. *Urban Soil Erosion and Sediment Control*. Water Pollution Control Research Series, Program #15030 DTL. Federal Water Quality Administration, U.S. Department of Interior. Washington, DC)

Yorke and Herb (Yorke, T.H., and W.J. Herb. 1978. *Effects of Urbanization on Streamflow and Sediment Transport in the Rock Creek and Anacostia River Basins, Montgomery County, Maryland, 1962-74*. USGS Professional Paper 1003, Washington, DC) evaluated nine subbasins in the Maryland portion of the Anacostia watershed for more than a decade in an effort to define the impacts of changing land use/land cover on sediment in runoff. Average annual suspended sediment yields for construction sites ranged from 7 to 100 tons/acre. Storm water discharges from construction sites that occur when the land area is disturbed (and prior to [\*68730] surface stabilization) can significantly impact designated uses. Examples of designated uses include public water supply, recreation, and propagation of fish and wildlife. The siltation process described previously can threaten all three designated uses by (1) depositing high concentrations of pollutants in public water supplies; (2) decreasing the depth of a waterbody, which can reduce the volume of a reservoir or result in limited use of a water body by boaters, swimmers, and other recreational enthusiasts; and (3) directly impairing the habitat of fish and other aquatic species, which can limit their ability to reproduce.

Excess sediment can cause a number of other problems for waterbodies. It is associated with increased turbidity and reduced light penetration in the water column, as well as more long-term effects associated with habitat destruction and increased difficulty in filtering drinking water. Numerous studies have examined the effect that excess sediment has on aquatic ecosystems. For example, sediment from road construction activity in Northern Virginia reduced aquatic insect and fish communities by up to 85 percent and 40 percent, respectively (Reed, J.R. 1997. "Stream Community Responses to Road Construction Sediments." Bulletin No. 97. Virginia Water Resources Research Center, Virginia Polytechnic Institute, Blacksburg, VA. As cited in Klein, R.D. 1990. *A Survey of Quality of Erosion and Sediment Control and Storm Water Management in the Chesapeake Bay Watershed*. Annapolis, MD: Chesapeake Bay Foundation). Other studies have shown that fine sediment (fine sand or smaller) adversely affects aquatic ecosystems by reducing light penetration, impeding sight-feeding, smothering benthic organisms, abrading gills and other sensitive structures, reducing habitat by clogging interstitial spaces within a streambed, and reducing the intergravel dissolved oxygen by reducing the permeability of the bed material (Everest, F.H., J.C. Beschta, K.V. Scrivener, J.R. Koski, J.R. Sedell, and C.J. Cederholm. 1987. "Fine Sediment and Salmonid Production: A Paradox." *Streamside Management: Forestry and Fishery Interactions*, Contract No. 57, Institute of Forest Resources, University of Washington, Seattle, WA). For example, 4.8 and 5.6 kilometers of stream below construction sites in the Patuxent River watershed in Maryland were found to have fine sediment amounts 15 times greater than normal (Fox, 1974. As cited in Klein, 1979). Benthic organisms in the streambed can be smothered by sediment deposits, causing changes in aquatic flora and fauna, such as fish species composition (Wolman and Schick, 1967). In addition, the primary cause of coral reef degradation in coastal areas is attributed to land disturbances and dredging activities due to urban development (Rogers, C.S. 1990. "Responses of Coral Reefs and Reef Organizations to Sedimentation." *Marine Ecology Progress Series*, 62:185-202).

EPA believes that the water quality impact from small construction sites is as high as or higher than the impact from larger sites on a per acre basis. The concentration of pollutants in the runoff from smaller sites is similar to the concentrations in the runoff from larger sites. The proportion of sediment that makes it from the construction site to surface waters is likely the same for larger and smaller construction sites in urban areas because the runoff from either site is usually delivered directly to the storm drain network where there is no opportunity for the sediment to be filtered out.

The expected contribution of total sediment yields from small sites depends, in part, on the extent to which erosion and sedimentation controls are being applied. Because current storm water regulations are more likely to require erosion and sedimentation controls on larger sites in urban areas, smaller construction sites that lack such programs are likely to contribute a disproportionate amount of the total sediment from construction activities (MacDonald, L.H. 1997. *Technical Justification for Regulating Construction Sites 1-5 Acres in Size*. Unpublished report submitted to U.S. EPA, Washington, DC). Smaller construction sites are less likely to have an effective plan to control erosion and sedimentation, are less likely to properly implement and maintain their plans, and are less likely to be inspected (Brown, W. and D. Caraco. 1997. *Controlling Storm Water Runoff Discharges from Small Construction Sites: A National Review*. Submitted

to Office of Wastewater Management, U.S. EPA, Washington, DC., by the Center for Watershed Protection, Silver Spring, MD). The proportion of sediment that makes it from the construction site to surface waters is likely the same for larger and smaller construction sites in urban areas because the runoff from either site is usually delivered directly to the storm drain network, where there is no opportunity for the sediment to be filtered out.

To confirm its belief that sediment yields from small sites are as high as or higher than the 20 to 150 tons/acre/year measured from larger sites, EPA gave a grant to the Dane County, Wisconsin Land Conservation Department, in cooperation with the USGS, to evaluate sediment runoff from two small construction sites. The first was a 0.34 acre residential lot and the second was a 1.72 acre commercial office development. Runoff from the sites was channeled to a single discharge point for monitoring. Each site was monitored before, during, and after construction.

The Dane County study found that total solids concentrations from these small sites are similar to total solids concentrations from larger construction sites. Results show that for both of the study sites, total solids and suspended solids concentrations were significantly higher during construction than either before or after construction. For example, pre-construction total solids concentrations averaged 642 mg/L during the period when ryegrass was established, active construction total solids concentrations averaged 2,788 mg/L, and post-construction total solids concentrations averaged 132 mg/L (on a pollutant load basis, this equaled 7.4 lbs preconstruction, 35 lbs during construction, and 0.6 lbs post-construction for total solids). While this site was not properly stabilized before construction, after construction was complete and the site was stabilized, post-construction concentrations were more than 20 times less than during construction. The results were even more dramatic for the commercial site. The commercial site had one preconstruction event, which resulted in total solids concentrations of 138 mg/L, while active construction averaged more than 15,000 mg/L and post-construction averaged only 200 mg/L (on a pollutant load basis, this equaled 0.3 lbs preconstruction, 490 lbs during construction, and 13.4 lbs post-construction for total solids). The active construction period resulted in more than 75 times more sediment than either before or after construction (Owens, D.W., P. Jopke, D.W. Hall, J. Balousek and A. Roa. 1999. "Soil Erosion from Small Construction Sites." Draft USGS Fact Sheet. USGS and Dane County Land Conservation Department, WI). The total solids concentrations from these small sites in Wisconsin are similar to total solids concentrations from larger construction sites. For example, a study evaluating the effects of highway construction in West Virginia found that a small storm produced a sediment concentration of 7,520 mg/L (Downs and Appel, 1986).

One important aspect of small construction sites is the number of small sites relative to larger construction sites [\*68731] and total land area within the watershed. Brown and Caraco surveyed 219 local jurisdictions to assess erosion and sediment control (ESC) programs. Seventy respondents provided data on the number of ESC permits for construction sites smaller than 5 acres. In 27 cases (38 percent of the respondents), more than three-quarters of the permits were for sites smaller than 5 acres; in another 18 cases (26 percent), more than half of the permits were for sites smaller than 5 acres.

In addition, data on the total acreage disturbed by smaller construction sites have been collected recently in two States (MacDonald, 1997). The most recent and complete data set is the listing of the disturbed area for each of the 3,831 construction sites permitted in North Carolina for 1994-1995 and 1995-1996. Nearly 61 percent of the sites that were 1 acre or larger were between 1.0 and 4.9 acres in size. This proportion was consistent between years. Data showed that this range of sites accounted for 18 percent of the total area disturbed by construction. The values showed very little variation between the 2 years of data. The total disturbed area for all sites over this 2-year period was nearly 33,000 acres, or about 0.1 percent of the total area of North Carolina.

EPA estimates that construction sites disturbing greater than 5 acres disturb 2.1-million acres of land (78.1 percent of the total) while sites disturbing between 1 and 5 acres of land disturb 0.5-million acres of land (19.4 percent). The remaining sites on less than 1 acres of land disturb 0.07-million acres of land (only 2.5 percent of the total). Given the high erosion rates associated with most construction sites, small construction sites can be a significant source of water quality impairment, particularly in small watersheds that are undergoing rapid development. Exempting sites under 1 acre will exclude only about 2.5 percent of acreage from program coverage, but will exclude a far higher number of sites, approximately 25 percent.

Several studies have determined that the most effective construction runoff control programs rely on local plan review and field enforcement (Paterson, R. G. 1994. "Construction Practices: the Good, the Bad, and the Ugly." *Watershed Protection Techniques* 1(3)). In his review, Paterson suggests that, given the critical importance of field implementation of erosion and sediment control programs and the apparent shortcomings that exist, much more focus should be given to plan implementation.

Several commenters disputed the data presented in the proposed rule for storm water discharges from smaller construction sites. One commenter stated that EPA has not adequately explained the basis for permitting construction activity down to 1 disturbed acre. Another commenter stated that EPA did not present sufficient data on water quality impacts from construction sites disturbing less than 5 acres.

EPA believes that the data presented above sufficiently support nationwide designation of storm water discharges from construction activity disturbing more than 1 acre. Based on total disturbed land area within a watershed, the cumulative effects of numerous small construction sites can have impacts similar to those of larger sites in a particular area. In addition, waivers for storm water discharges from smaller construction activity will exclude sites not expected to impair water quality. EPA will continue to collect water quality data on construction site storm water runoff.

### *C. Statutory Background*

In 1972, Congress enacted the CWA to prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. Congress added CWA section 402(p) in 1987 to require implementation of a comprehensive program for addressing storm water discharges. Section 402(p)(1) required EPA or NPDES-authorized States or Tribes to issue NPDES permits for the following five classes of storm water discharges composed entirely of storm water ("storm water discharges") specifically listed under section 402(p)(2):

- (A) a discharge subject to an NPDES permit before February 4, 1987
- (B) a discharge associated with industrial activity
- (C) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more
- (D) a discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000
- (E) a discharge that an NPDES permitting authority determines to be contributing to a violation of a water quality standard or a significant contributor of pollutants to the waters of the United States.

Section 402(p)(3)(A) requires storm water discharges associated with industrial activity to meet all applicable provisions of section 402 and section 301 of the CWA, including technology-based requirements and any more stringent requirements necessary to meet water quality standards. Section 402(p)(3)(B) establishes NPDES permit standards for discharges from municipal separate storm sewer systems, or MS4s. NPDES permits for discharges from MS4s (1) may be issued on a system or jurisdiction-wide basis, (2) must include a requirement to effectively prohibit non-storm water discharges into the storm sewers, and (3) must require controls to reduce pollutant discharges to the maximum extent practicable, including best management practices, and other provisions as the Administrator or the States determine to be appropriate for the control of such pollutants. At this time, EPA determines that water quality-based controls, implemented through the iterative processes described today are appropriate for the control of such pollutants and will result in reasonable further progress towards attainment of water quality standards. See sections II.L and II.H.3 of the preamble.

In CWA section 402(p)(4), Congress established statutory deadlines for the initial steps in implementing the NPDES program for storm water discharges. This section required development of NPDES permit application regulations, submission of NPDES permit applications, issuance of NPDES permits for sources identified in section 402(p)(2), and compliance with NPDES permit conditions. In addition, this section required industrial facilities and large MS4s to submit NPDES permit applications for storm water discharges by February 4, 1990. Medium MS4s were to submit NPDES permit applications by February 4, 1992. EPA and authorized NPDES States were prohibited from requiring an NPDES permit for any other storm water discharges until October 1, 1994.

Section 402(p)(5) required EPA to conduct certain studies and submit a report to Congress. This requirement is discussed in the following section.

Section 402(p)(6) requires EPA, in consultation with States and local officials, to issue regulations for the designation of additional storm water discharges to be regulated to protect water quality. It also requires EPA to extend the existing storm water program to regulate newly designated sources. At a minimum, the extension must establish (1) priorities, (2) requirements for State storm water management programs, and (3) expeditious deadlines. Section 402(p)(6) specifies that the program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as [\*68732] appropriate. Today's rule implements this section.

#### D. EPA's Reports to Congress

Under CWA section 402(p)(5), EPA, in consultation with the States, was required to conduct a study. The study was to identify unregulated sources of storm water discharges, determine the nature and extent of pollutants in such discharges, and establish procedures and methods to mitigate the impacts of such discharges on water quality. Section 402(p)(5) also required EPA to report the results of the first two components of that study to Congress by October 1, 1988, and the final report by October 1, 1989.

In March 1995, EPA submitted to Congress a report that reviewed and analyzed the nature of storm water discharges from municipal and industrial facilities that were not already regulated under the initial NPDES regulations for storm water (U.S. Environmental Protection Agency, Office of Water. 1995. *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress*. Washington, D.C. EPA 833-K-94-002) ("Report"). The Report also analyzed associated pollutant loadings and water quality impacts from these unregulated sources. Based on identification of unregulated municipal sources and analysis of information on impacts of storm water discharges from municipal sources, the Report recommended that the NPDES program for storm water focus on the 405 "urbanized areas" identified by the Bureau of the Census. The Report further found that a number of discharges from unregulated industrial facilities warranted further investigation to determine the need for regulation. It classified these unregulated industrial discharges in two groups: Group A and Group B. Group A comprised sources that may be considered a high priority for inclusion in the NPDES program for storm water because discharges from these sources are similar or identical to already regulated sources. These "look alike" storm water discharge sources were not covered in the initial NPDES regulations for storm water due to the language used to define "associated with industrial activity." In the initial regulations for storm water, "industrial activity" is identified using Standard Industrial Classification (SIC) codes. The use of SIC codes led to incomplete categorization of industrial activities with discharges that needed to be regulated to protect water quality. Group B consisted of 18 industrial sectors, which included sources that EPA expected to contribute to storm water contamination due to the activities conducted and pollutants anticipated onsite (e.g., vehicle maintenance, machinery and electrical repair, and intensive agricultural activities).

EPA reported on the latter component of the section 402(p)(5) study via President Clinton's Clean Water Initiative, which was released on February 1, 1994 (U.S. Environmental Protection Agency, Office of Water. 1994. *President Clinton's Clean Water Initiative*. Washington, D.C. EPA 800-R-94-001) ("Initiative"). The Initiative addressed a number of issues associated with NPDES requirements for storm water discharges and proposed (1) establishing a phased compliance with a water quality standards approach for discharges from municipal separate storm sewer systems with priority on controlling discharges from municipal growth and development areas, (2) clarifying that the maximum extent practicable standard should be applied in a site-specific, flexible manner, taking into account cost considerations as well as water quality effects, (3) providing an exemption from the NPDES program for storm water discharges from industrial facilities with no activities or significant materials exposed to storm water, (4) providing extensions to the statutory deadlines to complete implementation of the NPDES program for the storm water program, (5) targeting urbanized areas for the requirements in the NPDES program for storm water, and (6) providing control of discharges from inactive and abandoned mines located on Federal lands in a more targeted, flexible manner. Additionally, prior to promulgation of today's rule, section 431 of the Agency's Appropriation Act for FY 2000 (Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 2000, Public Law 106-74, section 432 (1999)) directed EPA to report on certain matters to be covered in today's rule. That report supplements the study required by CWA Section 402(p)(5). EPA is publishing the availability of that report elsewhere in this issue of the **Federal Register**.

Several commenters asserted that the Report to Congress is an inadequate basis for the designation and regulation of sources covered under today's final rule, specifically the nationwide designation of small municipal separate storm sewer systems within urbanized areas and construction activities disturbing between one and five acres.

EPA believes that it has developed an adequate record for today's regulation both through the Report to Congress and the Clean Water Initiative and through more recent activities, including the FACA Subcommittee process, regulatory notices and evaluation of comments, and recent research and analysis. EPA does not interpret the congressional reporting requirements of CWA section 402(p)(5) to be the sole basis for determining sources to be regulated under today's final rule.

EPA's decision to designate on a national basis small MS4s in urbanized areas is supported by studies that clearly show a direct correlation between urbanization and adverse water quality impacts from storm water discharges. (Schueler, T. 1987. *Controlling Urban Runoff: A Practical Manual for Planning & Designing Urban BMPs*. Metropolitan Washington Council of Governments). "Urbanized areas"-within which all small MS4s would be covered-represent the most intensely developed and dense areas of the Nation. They constitute only two percent of the land area but 63 percent of the total population. See section I.B.1, Urban Development, above, for studies and assessments of the link between urban development and storm water impacts on water resources.

Commenters argued that the Report to Congress does not address storm water discharges from construction sites. They further argued that the designation of small construction sites per today's final rule goes beyond the President's 1994 Initiative because the Initiative only recommends requiring municipalities to implement a storm water management program to control unregulated storm water sources, "including discharges from construction of less than 5 acres, which are part of growth, development and significant redevelopment activities." They point out that the Initiative provides that unregulated storm water discharges not addressed through a municipal program would not be covered by the NPDES program. Commenters assert that EPA has not developed a record independent of its section 402(p)(5) studies that demonstrates the necessity of regulating under a separate NPDES permit storm water discharges from smaller construction sites "to protect water quality." EPA disagrees.

EPA evaluated the nature and extent of pollutants from construction site sources in a process that was separate and distinct from the development of the Report to Congress. Today's decision to regulate certain storm water discharges from construction sites disturbing less than 5 acres arose in part [\*68733] out of the 9th Circuit remand in *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992). In that case, the court remanded portions of the Phase I storm water regulations related to discharges from construction sites. Those regulations define "storm water discharges associated with industrial activity" to include only those storm water discharges from construction sites disturbing 5 acres or more of total land area (see 40 CFR 122.26(b)(14)(x)). In its decision, the court concluded that the 5-acre threshold was improper because the Agency had failed to identify information "to support its perception that construction activities on less than 5 acres are non-industrial in nature" (966 F.2d at 1306). The court remanded the below 5 acre exemption to EPA for further proceedings (966 F.2d at 1310).

In a **Federal Register** notice issued on December 18, 1992, EPA noted that it did not believe that the Court's decision had the effect of automatically subjecting small construction sites to the existing application requirements and deadlines. EPA believed that additional notice and comment were necessary to clarify the status of these sites. The information received during the notice and comment process and additional research, as discussed in section I.B.3 Construction Site Runoff, formed the basis for the designation of construction activity disturbing between one and five acres on a nationwide basis. EPA's objectives in today's proposal include an effort to (1) address the 9th Circuit remand, (2) address water quality concerns associated with construction activities that disturb less than 5 acres of land, and (3) balance conflicting recommendations and concerns of stakeholders.

One commenter noted that EPA's proposal would fail to regulate industrial facilities identified as Group A and Group B in the March 1995 *Report to Congress*. EPA is relying on the analysis in the Report, which provided that the recommendation for coverage was meant as guidance and was not intended to be an identification of specific categories that must be regulated under Section 402(p)(6). *Report to Congress*, p. 4-1. The Report recognized the existence of limited data on which to base loadings estimates to support the nationwide designation of individual or categories of sources. *Report to Congress*, p. 4-44. Furthermore, during FACA Subcommittee discussion, EPA continued to urge stakeholders to provide further data relating to industrial and commercial storm water sources, which EPA did not receive. EPA concluded that, due to insufficient data, these sources were not appropriate for nationwide designation at this time.

#### *E. Industrial Facilities Owned or Operated by Small Municipalities*

Congress granted extensions to the NPDES permit application process for selected classes of storm water discharges associated with industrial activity. On December 18, 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act (ISTEA), which postponed NPDES permit application deadlines for most storm water discharges associated with industrial activity at facilities that are owned or operated by small municipalities. EPA and States authorized to administer the NPDES program could not require any municipality with a population of less than 100,000 to apply for or obtain an NPDES permit for any storm water discharge associated with industrial activity prior to October 1, 1992, except for storm water discharges from airports, power plants, or uncontrolled sanitary landfills. See 40 CFR 122.26(e)(1); 57 FR 11524, April 2, 1992 (reservation of NPDES application deadlines for ISTEA facilities).

The facilities exempted by ISTEA discharge storm water in the same manner (and are expected to use identical processes and materials) as the industrial facilities regulated under the 1990 Phase I regulations. Accordingly, these facilities pose similar water quality problems. The extended moratorium for these facilities was necessary to allow municipalities additional time to comply with NPDES requirements. The proposal for today's rule would have maintained the existing deadline for seeking coverage under an NPDES permit (August 7, 2001).

Today's rule changes the permit application deadline for such municipally owned or operated facilities discharging industrial storm water to make it consistent with the application date for small regulated MS4s. Because EPA missed its March 1999 deadline for promulgating today's rule, and the deadline for MS4s to submit permit applications has been extended to three years and 90 days from the date of this notice, the deadline for permitting ISTEA sources has been similarly extended. The permitting of these sources is discussed below in section "II.I.3. ISTEA Sources."

#### *F. Related Nonpoint Source Programs*

Today's rule addresses point source discharges of storm water runoff and non-storm water discharges into MS4s. Many of these sources have been addressed by nonpoint source control programs, which are described briefly below.

In 1987, section 319 was added to the CWA to provide a framework for funding State and local efforts to address pollutants from nonpoint sources not addressed by the NPDES program. To obtain funding, States are required to submit Nonpoint Source Assessment Reports identifying State waters that, without additional control of nonpoint sources of pollution, could not reasonably be expected to attain or maintain applicable water quality standards or other goals and requirements of the CWA. States are also required to prepare and submit for EPA approval a statewide Nonpoint Source Management Program for controlling nonpoint source water pollution to navigable waters within the State and improving the quality of such waters. State program submittals must identify specific best management practices (BMPs) and measures that the State proposes to implement in the first four years after program submission to reduce pollutant loadings from identified nonpoint sources to levels required to achieve the stated water quality objectives.

State nonpoint source programs funded under section 319 can include both regulatory and nonregulatory State and local approaches. Section 319(b)(2)(B) specifies that a combination of "nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects" may be used, as necessary, to achieve implementation of the BMPs or measures identified in the section 319 submittals.

Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA) of 1990 provides that States with approved coastal zone management programs must develop coastal nonpoint pollution control programs and submit them to EPA and the National Oceanic and Atmospheric Administration (NOAA) for approval. Failure to submit an approvable program will result in a reduction of Federal grants under both the Coastal Zone Management Act and section 319 of the CWA.

State coastal nonpoint pollution control programs under CZARA must include enforceable policies and mechanisms that ensure implementation of the management measures throughout the coastal management area. *EPA issued Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* under section 6217(g) in [\*68734] January 1993. The guidance identifies management measures for five major categories of nonpoint source pollution. The management measures reflect the greatest degree of pollutant reduction that is economically achievable for each of the listed sources. These management measures provide reference standards for the States to use in developing or refining their coastal nonpoint programs. A few management measures, however, contain quantitative standards that specify pollutant loading reductions. For example, the New Development Management Measure, which is applicable to construction in urban areas, requires (1) that by design or performance the average annual total suspended solid loadings be reduced by 80 percent and (2) to the extent practicable, that the pre-development peak runoff rate and average volume be maintained.

EPA and NOAA published *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (1993). The document clarifies that States generally must implement management measures for each source category identified in the EPA guidance developed under section 6217(g). Coastal Nonpoint Pollution Control Programs are not required to address sources that are clearly regulated under the NPDES program as point source discharges. Specifically, such programs would not need to address small MS4s and construction sites covered under NPDES storm water permits (both general and individual).

## **II. Description of Program**

A. Overview

I. Objectives EPA Seeks To Achieve in Today's Rule

EPA seeks to achieve several objectives in today's final rule. First, EPA is implementing the requirement under CWA section 402(p)(6) to provide a comprehensive storm water program that designates and controls additional sources of storm water discharges to protect water quality. Second, EPA is addressing storm water discharges from the activities exempted under the 1990 storm water permit application regulations that were remanded by the Ninth Circuit Court of Appeals in *NRDC v. EPA*, 966 F.2d 1292 (9th Circuit, 1992). These are construction activities disturbing less than 5 acres and so-called "light" industrial activities not exposed to storm water (see discussion of "no exposure" below). Third, EPA is providing coverage for the so-called "donut holes" created by the existing NPDES storm water program. Donut holes are geographic gaps in the NPDES storm water program's regulatory scheme. They are MS4s located within areas covered by the existing NPDES storm water program, but not currently addressed by the storm water program because it is based on political jurisdictions. Finally, EPA also is trying to promote watershed planning as a framework for implementing water quality programs where possible.

Although EPA had options for different approaches (see alternatives discussed in the January 9, 1998, proposed regulation), EPA believes it can best achieve its objectives through flexible innovations within the framework of the NPDES program. Unlike the interim section 402(p)(6) storm water regulations EPA promulgated in 1995, EPA no longer designates all of the unregulated storm water discharges for nationwide coverage under the NPDES program for storm water. The framework for today's final rule is one that balances automatic designation on a nationwide basis and locally-based designation and waivers. Nationwide designation applies to those classes or categories of storm water discharges that EPA believes present a high likelihood of having adverse water quality impacts, regardless of location. Specifically, today's rule designates discharges from small MS4s located in urbanized areas and storm water discharges from construction activities that result in land disturbance equal to or greater than one and less than five acres. As noted under Section I.B., Water Quality Concerns/Environmental Impact Studies and Assessments, these two categories of storm water sources, when unregulated, tend to cause significant adverse water quality impacts. Additional sources are not covered on a nationwide basis either because EPA currently lacks information indicating a consistent potential for adverse water quality impact or because EPA believes that the likelihood of adverse impacts on water quality is low, with some localized exceptions. Additional individual sources or categories of storm water discharges could, however, be covered under the program through a local designation process. A permitting authority may designate additional small MS4s after developing designation criteria and applying those criteria to small MS4s located outside of an urbanized area, in particular those with a population of 10,000 or more and a population density of at least 1,000. Exhibit 1 illustrates the designation framework for today's final rule. [\*68735]

Exhibit 1.--Phase II Source Decisions

WATER QUALITY IMPACT OF SOURCES

LOW LIKELIHOOD/  
 INSUFFICIENT INFORMATION

HIGH LIKELIHOOD

NOT AUTOMATICALLY  
 DESIGNATED BY RULE

AUTOMATICALLY  
 DESIGNATED BY RULE

. Small MS4s located  
 outside urbanized Areas.  
 . Construction activity  
 that results in the land  
 disturbance of less than 1  
 acre.

National . All small MS4s located  
 Assessment inside Urbanized Areas.  
 . Construction activity  
 that results in the land  
 disturbance of greater than  
 or equal to 1 acre and less  
 than 5 acres.

. Non-Phase I industrial  
 and commercial sources.

BUT DESIGNATED BY  
 PERMITTING AUTHORITY IF

BUT WAIVERS PROVIDED FOR

. A small MS4 meets the designation criteria. The permitting authorities are required to develop and apply designation criteria to, at a minimum, those small MS4s located in an area with a population of at least 10,000 and a population density of at least 1,000.

. Regulated small MS4s that serve a population of less than 1,000, are not Local Water contributing substantially to the pollutant loadings Assessment of a physically interconnected MS4, and if discharging to an impaired water body, storm water controls need not be based on a TMDL that addresses the pollutants of concern.

. A small MS4 is contributing substantially to the pollutant loading of a physically interconnected MS4 that is regulated by the NDPEs storm water program.

. Regulated small MS4s that serve a population under 10,000, permitting authority has evaluated all waters that received a discharge from the MS4, storm water controls are not needed based on a TMDL for those waters, and future discharges from the MSD4 are evaluated.

. A TMDL \* defines a need to cover small MS4s, construction activity, and industrial/commercial sources not currently regulated.

. It is determined that the storm water discharge from a small MS4, construction site or industrial/commercial facility contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

. Construction activity disturbing between 1 and 5 acres where:  
(1) Activity occurs during negligible rainfall period (rainfall erosivity factor of less than 5), or  
(2) A TMDL or equivalent analysis addresses the pollutants of concern leading to a determination that storm water controls are not necessary for construction activity.

\* EPA will continue to require States to comply with their Total Maximum Daily Load (TMDL) implementation schedules. [\*68736]

The designation framework for today's final rule provides a significant degree of flexibility. The proposed provisions for nationwide designation of storm water discharges from construction and from small MS4s in urbanized areas allowed for a waiver of applicable requirements based on appropriate water quality conditions. Today's final rule expands and simplifies those waivers.

The permitting authority may waive the requirement for a permit for any small MS4 serving a jurisdiction with a population of less than 1,000 unless storm water controls are needed because the MS4 is contributing to a water quality impairment. The permitting authority may also waive permit coverage for MS4s serving a jurisdiction with a population of less than 10,000 if all waters that receive a discharge from the MS4 have been evaluated and discharges from the MS4 do not significantly contribute to a water quality impairment or have the potential to cause an impairment. Today's



rule also allows States with a watershed permitting approach to phase in coverage for MS4s in jurisdictions with populations under 10,000.

Water quality conditions are also the basis for a waiver of requirements for storm water discharges from construction activities disturbing between one and five acres. For these small construction sources, the rule provides significant flexibility for waiving otherwise applicable regulatory requirements where a permitting authority determines, based on water quality and watershed considerations, that storm water discharge controls are not needed.

Coverage can be extended to municipal and construction sources outside the nationwide designated classes or categories based on watershed and case-by-case assessments. For the municipal storm water program, today's rule provides broad discretion to NPDES permitting authorities to develop and implement criteria for designating storm water discharges from small MS4s outside of urbanized areas. Other storm water discharges from unregulated industrial, commercial, and residential sources will not be subject to the NPDES permit requirements unless a permitting authority determines on a case-by-case basis (or on a categorical basis within identified geographic areas such as a State or watershed) that regulatory controls are needed to protect water quality. EPA believes that the flexibility provided in today's rule facilitates watershed planning.

## 2. General Requirements for Regulated Entities Under Today's Rule

As previously noted, today's final rule defines additional classes and categories of storm water discharges for coverage under the NPDES program. These designated dischargers are required to seek coverage under an NPDES permit. Furthermore, all NPDES-authorized States and Tribes are required to implement these provisions and make any necessary amendments to current State and Tribal NPDES regulations to ensure consistency with today's final rule. EPA remains the NPDES permitting authority for jurisdictions without NPDES authorization.

Today's final rule includes some new requirements for NPDES permitting authorities implementing the CWA section 402(p)(6) program. EPA has made a significant effort to build flexibility into the program while attempting to maintain an appropriate level of national consistency. Permitting authorities must ensure that NPDES permits issued to MS4s include the minimum control measures established under the program. Permitting authorities also have the ability to make numerous decisions including who is regulated under the program, i.e., case-by-case designations and waivers, and how responsibilities should be allocated between regulated entities.

Today's final rule extends the NPDES program to include discharges from the following: small MS4s within urbanized areas (with the exception of systems waived from the requirements by the NPDES permitting authority); other small MS4s meeting designation criteria to be established by the permitting authority; and any remaining MS4 that contributes substantially to the storm water pollutant loadings of a physically interconnected MS4 already subject to regulation under the NPDES program. Small MS4s include urban storm sewer systems owned by Tribes, States, political subdivisions of States, as well as the United States, and other systems located within an urbanized area that fall within the definition of an MS4. These include, for example, State departments of transportation (DOTs), public universities, and federal military bases.

Today's final rule requires all regulated small MS4s to develop and implement a storm water management program. Program components include, at a minimum, 6 minimum measures to address: public education and outreach; public involvement; illicit discharge detection and elimination; construction site runoff control; post-construction storm water management in new development and redevelopment; and pollution prevention and good housekeeping of municipal operations. These program components will be implemented through NPDES permits. A regulated small MS4 is required to submit to the NPDES permitting authority, either in its notice of intent (NOI) or individual permit application, the BMPs to be implemented and the measurable goals for each of the minimum control measures listed above.

The rule addresses all storm water discharges from construction site activities involving clearing, grading and excavating land equal to or greater than 1 acre and less than 5 acres, unless requirements are otherwise waived by the NPDES permitting authority. Discharges from such sites, as well as construction sites disturbing less than 1 acre of land that are designated by the permitting authority, are required to implement requirements set forth in the NPDES permit, which may reference the requirements of a qualifying local program issued to cover such discharges.

The rule also addresses certain other sources regulated under the existing NPDES program for storm water. For municipally-owned industrial sources required to be regulated under the existing NPDES storm water program but exempted from immediate compliance by the Intermodal Surface Transportation Act of 1991 (ISTEA), the rule revises the existing deadline for seeking coverage under an NPDES permit (August 7, 2001) to make it consistent with the applica-

tion date for small regulated MS4s. (See section I.3. below.) The rule also provides relief from NPDES storm water permitting requirements for industrial sources with no exposure of industrial materials and activities to storm water.

### 3. Integration of Today's Rule With the Existing Storm Water Program

In developing an approach for today's final rule, numerous early interested stakeholders encouraged EPA to seek opportunities to integrate, where possible, the proposed Phase II requirements with existing Phase I requirements, thus facilitating a unified storm water discharge control program. EPA believes that this objective is met by using the NPDES framework. This framework is already applied to regulated storm water discharge sources and is extended to those sources designated under today's rule. This approach facilitates program consistency, public access to information, and program oversight. [\*68737]

EPA believes that today's final rule provides consistency in terms of program coverage and requirements for existing and newly designated sources. For example, the rule includes most of the municipal donut holes, those MS4s located in incorporated places, townships or towns with a population under 100,000 that are within Phase I counties. These MS4s are not addressed by the existing NPDES storm water program while MS4s in the surrounding county are currently addressed. In addition, the minimum control measures required in today's rule for regulated small MS4s are very similar to a number of the permit requirements for medium and large MS4s under the existing storm water program. Following today's rule, permit requirements for all regulated MS4s (both those under the existing program and those under today's rule) will require implementation of BMPs. Furthermore, with regard to the development of NPDES permits to protect water quality, EPA intends to apply the August 1, 1996, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits* (hereinafter, "Interim Permitting Approach") (see Section II.L.1. for further description) to all MS4s covered by the NPDES program.

EPA is applying NPDES permit requirements to construction sites below 5 acres that are similar to the existing requirements for those above 5 acres and above. In addition, today's rule allows compliance with qualifying local, Tribal, or State erosion and sediment controls to meet the erosion and sediment control requirements of the general permits for storm water discharges associated with construction, both above and below 5 acres.

### 4. General Permits

EPA recommends using general permits for all newly regulated storm water sources under today's rule. The use of general permits, instead of individual permits, reduces the administrative burden on permitting authorities, while also limiting the paperwork burden on regulated parties seeking permit authorization. Permitting authorities may, of course, require individual permits in some cases to address specific concerns, including permit non-compliance.

EPA recommends that general permits for MS4s, in particular, be issued on a watershed basis, but recognizes that each permitting authority must decide how to develop its general permit(s). Permit conditions developed to address concerns and conditions of a specific watershed could reflect a watershed plan; such permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL. If the permitting authority issues a State-wide general permit, the permitting authority may include separate conditions tailored to individual watersheds or urbanized areas. Of course, for a newly regulated MS4, modification of an existing individual MS4 permit to include the newly regulated MS4 as a "limited co-permittee" also remains an option.

### 5. Tool Box

During the FACA process, many Storm Water Phase II FACA Subcommittee representatives expressed an interest, which was endorsed by the full Committee, in having EPA develop a "tool box" to assist States, Tribes, municipalities, and other parties involved in the Phase II program. EPA made a commitment to work with Storm Water Phase II FACA Subcommittee representatives in developing such a tool box, with the expectation that a tool box would facilitate implementation of the storm water program in an effective and cost-efficient manner. EPA has developed a preliminary working tool box (available on EPA's web page at [www.epa.gov/owm/sw/toolbox](http://www.epa.gov/owm/sw/toolbox)). EPA intends to have the tool box fully developed by the time of the first general permits. EPA also intends to update the tool box as resources and data become available. The tool box will include the following eight main components: fact sheets; guidances; a menu of BMPs for the six MS4 minimum measures; an information clearinghouse; training and outreach efforts; technical research; support for demonstration projects; and compliance monitoring/assistance tools. EPA intends to issue the menu of BMPs, both structural and non-structural, by October 2000. In addition, EPA will issue by October 2000 a "model"

permit and will issue by October 2001 guidance materials on the development of measurable goals for municipal programs.

In an attempt to avoid duplication, the Agency has undertaken an effort to identify and coordinate sources of information that relate to the storm water discharge control program from both inside and outside the Agency. Such information includes research and demonstration projects, grants, storm water management-related programs, and compendiums of available documents, including guidances, related directly or indirectly to the comprehensive NPDES storm water program. Based on this effort, EPA is developing a tool box containing fact sheets and guidance documents pertaining to the overall program and rule requirements (e.g., guidance on municipal and construction programs, and permitting authority guidance on designation and waiver criteria); models of current programs aimed at assisting States, Tribes, municipalities, and others in establishing programs; a comprehensive list of reference documents organized according to subject area (e.g., illicit discharges, watersheds, water quality standards attainment, funding sources, and similar types of references); educational materials; technical research data; and demonstration project results. The information collected by EPA will not only provide the background for tool box materials, but will also be made available through an information clearinghouse on the world wide web.

With assistance from EPA, the American Public Works Association (APWA) developed a workbook and series of workshops on the proposed Phase II rule. Ten workshops were held from September 1998 through May 1999. Depending on available funding, these workshops may continue after publication of today's final rule. EPA also intends to provide training to enable regional offices to educate States, Tribes, and municipalities about the storm water program and the availability of the tool box materials.

The CWA currently provides funding mechanisms to support activities related to storm water. These mechanisms will be described in the tool box. Activities funded under grant and loan programs, which could be used to assist in storm water program development, include programs in the nonpoint source area, storm water demonstration projects, source water protection and wastewater construction projects. EPA has already provided funding for numerous research efforts in these areas, including a database of BMP effectiveness studies (described below), an assessment of technologies for storm water management, a study of the effectiveness of storm water BMPs for controlling the impacts of watershed imperviousness, protocols for wet weather monitoring, development of a dynamic model for wet weather flows, and numerous outreach projects.

EPA has entered into a cooperative agreement with the Urban Water Resources Research Council of the American Society of Civil Engineers (ASCE) to develop a scientifically-based management tool for the information [\*68738] needed to evaluate the effectiveness of urban storm water runoff BMPs nationwide. The long-term goal of the National Stormwater BMP Database project is to promote technical design improvements for BMPs and to better match their selection and design to the local storm water problems being addressed. The project team has collected and evaluated hundreds of existing published BMP performance studies and created a database covering about 75 test sites. The database includes detailed information on the design of each BMP and its watershed characteristics, as well as its performance. Eventually the database will include the nationwide collection of information on the characteristics of structural and non-structural BMPs, data collection efforts (e.g., sampling and flow gaging equipment), climatological characteristics, watershed characteristics, hydrologic data, and constituent data. The database will continue to grow as new BMP data become available. The initial release of the database, which includes data entry and retrieval software, is available on CD-ROM and operates on Windows<(R)>-compatible personal computers. The ASCE project team envisions that periodic updates to the database will be distributed through the Internet. The team is currently developing a system for Internet retrieval of selected database records, and this system is expected to be available in early 2000.

EPA and ASCE invite BMP designers, owners and operators to participate in the continuing database development effort. To make this effort successful, a large database is essential. Interested persons are encouraged to submit their BMP performance evaluation data and associated BMP watershed characteristics for potential entry into the database. The software included in the CD-ROM allows data providers to enter their BMP data locally, retain and edit the data as needed, and submit them to the ASCE Database Clearinghouse when ready.

To obtain a copy of the database, please contact Jane Clary, Database Clearinghouse Manager, Wright Water Engineers, Inc., 2490 W. 26th Ave., Suite 100A, Denver, CO 80211; Phone 303-480-1700; E-mail [clary@wrightwater.com](mailto:clary@wrightwater.com).

In addition, EPA requests that researchers planning to conduct BMP performance evaluations compile and collect BMP reporting information according to the standard format developed by ASCE. The format is provided with the database software and is also available on the ASCE website at [www.asce.org/peta/tech/nsbd01.html](http://www.asce.org/peta/tech/nsbd01.html).

6. Deadlines Established in Today's Action

Exhibit 2 outlines the various deadlines established under today's final rule. EPA believes that the dates allow sufficient time for completion of both the NPDES permitting authority's and the permittee's program responsibilities.

Exhibit 2-Storm Water Phase II Actions Deadlines

Activity	Deadline date
NPDES-authorized States modify NPDES program if no statutory change is required	1 year from date of publication of today's rule in the Federal Register.
NPDES-authorized States modify NPDES program if statutory change is required	2 years from date of publication of today's rule in the Federal Register.
EPA issues a menu of BMPs for regulated small MS4s	October 27, 2000
ISTEA sources submit permit application	3 years and 90 days from date of publication of today's rule in the Federal Register.
Permitting authority issues general permit(s) (if this type of permit coverage is selected)	3 years from date of publication of today's rule in the Federal Register.
Regulated small MS4s submit permit application:	
a. If designated under § 122.32(a)(1) unless the permitting authority has established a phasing schedule under § 123.35(d)(3)	a. 3 years and 90 days from date of publication of today's rule in the Federal Register.
b. If designated under § 122.32(a)(2) or §§ 122.26(a)(9)(i) (C) or (D)	b. Within 180 days of notice.
Storm water discharges associated with small construction activity submit permit application:	
a. If designated under § 122.26(b)(15)(i)	a. 3 years and 90 days from date of publication of today's rule in the Federal Register
b. If designated under § 122.26(b)(15)(ii)	b. Within 180 days of notice.
Permitting authority designates small MS4s under § 123.35(b)(2)	3 years from date of publication of today's rule in the Federal Register or 5 years from date of publication of today's rule in the Federal Register if a watershed plan is in place
Regulated small MS4s' program fully developed and implemented	Up to 5 years from date of permit issuance.
Reevaluation of the municipal storm water rules by EPA	13 years from date of publication of today's rule in the Federal Register
Permitting authority determination on a petition	Within 180 days of receipt.
Non-municipal sources designated under § 122.26(a)(9)(i) (C) or (D) submit permit application	Within 180 days of notice.

Exhibit 2-Storm Water Phase II Actions Deadlines

Activity	Deadline date
Submission of No Exposure Certification	Every 5 years.

*B. Readable Regulations*

Today, EPA is finalizing new regulations in a "readable regulation" format. This reader-friendly, plain language approach is a departure from traditional regulatory language and should enhance the rule's readability. These plain language regulations use questions and answers, "you" to identify the person who must comply, and terms like "must" rather than "shall" to identify a mandate. This new format, which minimizes layers of subparagraphs, should also allow the reader to easily locate specific provisions of the regulation.

Some sections of today's final rule are presented in the traditional language and format because these sections amend existing regulations. The readable regulation format was not used in these existing provisions in an attempt to avoid confusion or disruption [\*68739] of the readability of the existing regulations.

Most commenters supported EPA's use of plain language and agreed with EPA that the question and answer format makes the rule easier to understand. Three commenters thought that EPA should retain the traditional rule format. The June 1, 1998, Presidential memorandum directs all government agencies to write documents in plain language. Based on the majority of the comments, EPA has retained the plain language format used in the January 9, 1998, proposal in today's final rule.

The proposal to today's final rule included guidance as well as legal requirements. The word "must" indicates a requirement. Words like "should," "could," or "encourage" indicate a recommendation or guidance. In addition, the guidance was set off in parentheses to distinguish it from requirements.

EPA received numerous comments supporting the inclusion of guidance in the text of the Code of Federal Regulations (CFR), as well as comments opposing inclusion of guidance. Supporters stated that preambles and guidance documents are often not accessible when rules are implemented. Any language not included in the CFR is therefore not available when it may be most needed. Commenters that opposed including guidance in the CFR expressed the concern that any language in the rule might be interpreted as a requirement, in spite of any clarifying language. They suggested that guidance be presented in the preamble and additional guidance documents.

The majority of commenters on this issue thought that the guidance should be retained but the distinction between requirements and guidance should be better clarified. Suggestions included clarifying text, symbols, and a change from use of the word "should" to "EPA recommends" or "EPA suggests". EPA believes that it is important to include the guidance in the rule and agrees that the distinction between requirements and EPA recommendations must be very clear. In today's final rule, EPA has put the guidance in paragraphs entitled "Guidance" and replaced the word "should" with "EPA recommends." This is intended to clarify that the recommendations contained in the guidance paragraphs are not legally binding.

*C. Program Framework: NPDES Approach*

Today's rule regulates Phase II sources using the NPDES permit program. EPA interprets Clean Water Act section 402(p)(6) as authorizing the Agency to develop a storm water program for Phase II sources either as part of the existing NPDES permit program or as a stand alone non-NPDES program such as a self-implementing rule. Under either approach, EPA interprets section 402(p)(6) as directing EPA to publish regulations that "regulate" the remaining unregulated sources, specifically to establish requirements that are federally enforceable under the CWA. Although EPA believes that it has the discretion to not require sources regulated under CWA section 402(p)(6) to be covered by NPDES permits, the Agency has determined, for the reasons discussed below, that it is most appropriate to use NPDES permits in implementing the program to address the sources designated for regulation in today's rule.

As discussed in Section II.A, Overview, EPA sought to achieve certain goals in today's final rule. EPA believes that the NPDES program best achieves EPA's goals for today's final rule for the reasons discussed below.

Requiring Phase II sources to be covered by NPDES permits helps address the consistency problems currently caused by municipal "donut holes." Donut holes are gaps in program coverage where a small unregulated MS4 is lo-

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cated next to or within a regulated larger MS4 that is subject to an NPDES permit under the Phase I NPDES storm water program. The existence of such "donut holes" creates an equity problem because similar discharges may remain unregulated even though they cause or contribute to the same adverse water quality impacts. Using NPDES permits to regulate the unregulated discharges in these areas is intended to facilitate the development of a seamless regulatory program for the mitigation and control of contaminated storm water discharges in an urbanized area. For example, today's rule allows a newly regulated MS4 to join as a "limited" co-permittee with a regulated MS4 by referencing a common storm water management program. Such cooperation should be further encouraged by the fact that the minimum control measures required in today's rule for regulated small MS4s are very similar to a number of the permit requirements for medium and large MS4s under the Phase I storm water program. The minimum control measures applicable to discharges from smaller MS4s are described with slightly more generality than under the Phase I permit application regulations for larger MS4s, thus enabling maximum flexibility for operators of smaller MS4s to optimize efforts to protect water quality.

Today's rule also applies NPDES permit requirements to construction sites below 5 acres that are similar to the existing requirements for those 5 acres and above. In addition, the rule would allow compliance with qualifying local, Tribal, or State erosion and sediment controls to meet the erosion and sediment control requirements of the general permits for storm water discharges associated with construction, both above and below 5 acres.

Incorporating the CWA section 402(p)(6) program into the NPDES program capitalizes upon the existing governmental infrastructure for administration of the NPDES program. Moreover, much of the regulated community already understands the NPDES program and the way it works.

Another goal of the NPDES program approach is to provide flexibility in order to facilitate and promote watershed planning and sensitivity to local conditions. NPDES permits promote those goals in several ways. NPDES general permits may be used to cover a category of regulated sources on a watershed basis or within political boundaries. The NPDES permitting process provides a mechanism for storm water controls tailored on a case-by-case basis, where necessary. In addition, the NPDES permit requirements of a permittee may be satisfied by another cooperating entity. Finally, NPDES permits may incorporate the requirements of existing State, Tribal and local programs, thereby accommodating State and Tribes seeking to coordinate the storm water program with other programs, including those that focus on watershed-based nonpoint source regulation.

In promoting the watershed approach to program administration, EPA believes NPDES general permits can cover a category of dischargers within a defined geographic area. Areas can be defined very broadly to include political boundaries (e.g., county), watershed boundaries, or State or Tribal land.

NPDES permits generally require an application or a notice of intent (NOI) to trigger coverage. This information exchange assures communication between the permitting authority and the regulated community. This communication is critical in ensuring that the regulated community is aware of the requirements and the permitting authority is aware of the potential for adverse impacts to water quality from identifiable locations. The NPDES permitting process includes the public as a valuable stakeholder and ensures [\*68740] that the public is included and information is made publicly available.

Another concern for EPA and several stakeholders was that the program ensure citizen participation. The NPDES approach ensures opportunities for citizen participation throughout the permit issuance process, as well as in enforcement actions. NPDES permits are also federally enforceable under the CWA.

EPA believes that the use of NPDES permits makes a significant difference in the degree of compliance with regulations in the storm water program. The NPDES program provides for public participation in the development, enforcement and revision of storm water management programs. Citizen suit enforcement has assisted in focusing attention on adverse water quality impacts on a localized, public priority basis. Citizens frequently rely on the NPDES permitting process and the availability of NOIs to track program implementation and help them enforce regulatory requirements.

NPDES permits are also advantageous to the permittee. The NPDES permit informs the permittee about the scope of what it is expected to do to be in compliance with the Clean Water Act. As explained more fully in EPA's April 1995 guidance, *Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits*, compliance with an NPDES permit constitutes compliance with the Clean Water Act (see CWA section 402(k)). In addition, NPDES permittees are excluded from duplicative regulatory regimes under the Resource Conservation and Recovery

Act and the Comprehensive Emergency Response, Compensation and Liability Act under RCRA's exclusions to the definition of "solid waste" and CERCLA's exemption for "federally permitted releases."

EPA considered suggestions that the Agency authorize today's rule to be implemented as a self-implementing rule. This would be a regulation promulgated at the Federal, State, or Tribal level to control some or all of the storm water dischargers regulated under today's rule. Under this approach, a rule would spell out the specific requirements for dischargers and impose the restrictions and conditions that would otherwise be contained in an NPDES permit. It would be effective until modified by EPA, a State, or a Tribe, unlike an NPDES permit which cannot exceed a duration of five years. Some stakeholders believed that this approach would reduce the burden on the regulated community (e.g., by not requiring permit applications), and considerably reduce the amount of additional paperwork, staff time and accounting required to administer the proposed permit requirements.

EPA is sensitive to the interest of some stakeholders in having a streamlined program that minimizes the burden associated with permit administration and maximizes opportunities for field time spent by regulatory authorities. Key provisions in today's rule address some of these concerns by promoting a streamlined approach to permit issuance by, for example, using general permits and allowing the incorporation of existing programs. By adopting the NPDES approach rather than a self-implementing rule, today's rule also allows for consistent regulation between larger MS4s and construction sites regulated under the existing storm water management rule and smaller sources regulated under today's rule.

EPA believes that it is most appropriate to use NPDES permits to implement a program to address the sources regulated by today's rule. In addition to the reasons discussed above, NPDES permits provide a better mechanism than would a self-implementing rule for tailoring storm water controls on a case-by-case basis, where necessary. One commenter reasoned this concern could be addressed by including provisions in the regulation that allow site-specific BMPs (*i.e.*, case-by-case permits), suggesting storm water discharges that might require site-specific BMPs can be identified during the designation process of the regulatory authority. EPA believes that, in addition to its complexity, the commenter's approach lacks the other advantages of the NPDES permitting process.

A self-implementing rule would not ensure the degree of public participation that the NPDES permit process provides for the development, enforcement and revision of the storm water management program. A self-implementing rule also might not have provided the regulated community the "permit shield" under CWA section 402(k) that is provided by an NPDES permit. Based on all these considerations, EPA declined to adopt a self-implementing rule approach and adopted the NPDES approach.

Some State representatives sought alternative approaches for State implementation of the storm water program for Phase II sources. These State representatives asserted that a non-NPDES alternative approach best facilitated watershed management and avoided duplication and overlapping regulations. These representatives believed the NPDES approach would undercut State programs that had developed storm water controls tailored to local watershed concerns. Finally, a number of commenters expressed the view that States implement a variety of programs not based on the CWA that are effective in controlling storm water, and that EPA should provide incentives for their implementation and improvement in performance.

Throughout the development of the rule, State representatives sought alternatives to the NPDES approach for State implementation of the storm water program for Phase II sources. Discussions focused on an approach whereby States could develop an alternative program that EPA would approve or disapprove based on identified criteria, including that the alternative non-NPDES program would result in "equivalent or better protection of water quality." The State representatives, however, were unable to propose or recommend criteria for gauging whether a program would provide equivalent protection. EPA also did not receive any suggestions for objective, workable criteria in response to the Agency's explicit request for specific criteria (by which EPA could objectively judge such programs) in the preamble to the proposed rule.

EPA evaluated several existing State initiatives to address storm water and found many cases where standards under State programs may be coordinated with the Federal storm water program. Where the NPDES permit is developed in coordination with State standards, there are opportunities to avoid duplication and overlapping requirements. Under today's rule, an NPDES permitting authority may include conditions in the NPDES permit that direct an MS4 to follow the requirements imposed under State standards, rather than the requirements of § 122.34(b). This is allowed as long as the State program at a minimum imposes the relevant requirements of § 122.34(b). Additional opportunities follow from other provisions in today's rule.

Seeking to further explore the feasibility of a non-NPDES approach, the Agency, after the proposal, had extensive discussions with representatives of a number of States. Discussions related specifically to possible alternatives for regulations of urban storm water discharges and MS4s specifically. The Agency also sought input on these issues from other stakeholders.

As a result of these discussions, many of the commenters provided input on issues such as: whether or not the Agency should require NPDES permits; whether location of MS4s in urbanized [\*68741] areas should be the basis for designation or whether designation should be based on other determinations relating to water quality; whether States should be allowed to satisfy the conditions of the rule through the use of existing State programs; and issues concerning timing and resources for program implementation.

In response, today's rule still follows the regulatory scheme of the proposed rule, but incorporates additional flexibility to address some of the concerns raised by commenters.

In order to facilitate implementation by States that utilize a watershed permitting approach or similar approach (*i.e.*, based on a State's unified watershed assessments), today's rule allows States to phase in coverage for MS4s in jurisdictions with a population less than 10,000. Under such an approach, States could focus their resources on a rolling basis to assist smaller MS4s in developing storm water programs.

In addition, in response to concerns that the rule should not require permit coverage for MS4s that do not significantly contribute to water quality impairments, today's rule provides options for two waivers for small MS4s. The rule allows permitting authorities to exempt from the requirement for a permit any MS4 serving a jurisdiction with a population less than 1,000, unless the State determines that the MS4 must implement storm water controls because it is significantly contributing to a water quality impairment. A second waiver option applies to MS4s serving a jurisdiction with a population less than 10,000. For those MS4s, the State must determine that discharges from the MS4 do not significantly contribute to a water quality impairment, or have the potential for such an impairment, in order to provide the exemption. The State must review this waiver on a periodic basis no less frequently than once every five years.

Throughout the development of today's rule, commenters questioned whether the Clean Water Act authorized the use of the NPDES permit program, pointing out that the text of CWA 402(p)(6) does not use the word "permit." Based on the absence of the word "permit" and the express mention of State storm water management programs, the commenters asserted that Congress did not intend for Phase II sources to be regulated using NPDES permits.

EPA disagrees with the commenters' interpretation of section 402(p)(6). Section 402(p)(6) does not preclude use of permits as part of the "comprehensive program" to regulate designated sources. The language provides EPA with broad discretion in the establishment of the "comprehensive program." Absence of the word "permit" (a term that the statute does not otherwise define) does not preclude use of a permit, which is a familiar and reasonably well understood regulatory implementation vehicle. First, section 402(p)(6) says that EPA must establish a comprehensive program that "shall, at a minimum, establish priorities, establish requirements for State stormwater management programs, and establish expeditious deadlines." The "at a minimum" language suggests that the Agency may, and perhaps should, develop a comprehensive program that does more than merely attend to these minimum criteria. Use of the term "at a minimum" preserves for the Agency broad discretion to establish a comprehensive program that includes use of NPDES permits.

Further, in the final sentence of the section, Congress included additional language to affirm the Agency's discretion. The final sentence clarifies that the Phase II program "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." Under existing CWA programs, performance standards, (effluent limitations) guidelines, management practices, and treatment requirements are typically implemented through NPDES or dredge and fill permits.

Although EPA believes that it had the discretion to not require permits, the Agency has determined that it is reasonable to interpret section 402(p)(6) to authorize permits. Moreover, for the reasons discussed above, the Agency believes that it is appropriate to use NPDES permits in implementing today's rule.

#### *D. Federal Role*

Today's final rule describes EPA's approach to expand the existing storm water program under CWA section 402(p)(6). As in all other Federal programs, the Federal government plays an integral role in complying with, developing, implementing, overseeing, and enforcing the program. This section describes EPA's role in the revised storm water program.



### 1. Develop Overall Framework of the Program

The storm water discharge control program under CWA section 402(p)(6) consists of the rule, tool box, and permits. EPA's primary role is to ensure timely development and implementation of all components. Today's rule is a refinement of the first step in developing the program. EPA is fully committed to continuing to work with involved stakeholders on developing the tool box and issuing permits. As noted in today's rule, EPA will assess the municipal storm water program based on (1) evaluations of data from the NPDES municipal storm water program, (2) research concerning water quality impacts on receiving waters from storm water, and (3) research on BMP effectiveness. (Section II.H, Municipal Role, provides a more detailed discussion of this provision.)

EPA is planning to standardize minimum requirements for construction and post-construction BMPs in a new rulemaking under Title III of the CWA. While larger construction sites are already subject to NPDES permits (and smaller sites will be subject to permits pursuant to today's rule), the permits generally do not contain specific requirements for BMP design or performance. The permits require the preparation of storm water pollution prevention plans, but actual BMP selection and design is at the discretion of permittees, in conformance with applicable State and local requirements. Where there are existing State and local requirements specific to BMPs, they vary widely, and many jurisdictions do not have such requirements.

In developing these regulations, EPA intends to evaluate the inclusion of design and maintenance criteria as minimum requirements for a variety of BMPs used for erosion and sediment control at construction sites, as well as for permanent BMPs used to manage post-construction storm water discharges. The Agency plans to consider the merits and performance of all appropriate management practices (both structural and non-structural) that can be used to reduce adverse water quality impacts. EPA does not intend to require the use of particular BMPs at specific sites, but plans to assist builders and developers in BMP selection by publishing data on the performance to be expected by various BMP types. EPA would like to build upon the successes of some of the effective State and local storm water programs currently in place around the country, and to establish nation-wide criteria to support builders and local jurisdictions in appropriate BMP selection.

### 2. Encourage Consideration of Smart Growth Approaches

In the proposal, EPA invited comment on possible approaches for providing [\*68742] incentives for local decision making that would limit the adverse impacts of growth and development on water quality. EPA asked for comments on this "smart growth" approach.

EPA received comments on all sides of this issue. A number of commenters supported the idea of "smart growth" incentives but did not present concrete ideas. Several commenters suggested "smart growth" criteria. States that have adopted "smart growth" laws were worried that EPA's focus on urbanized areas for municipal requirements could encourage development outside of designated growth areas. Today's final rule clearly allows States to expand coverage of their municipal storm water program outside of urbanized areas. In addition, the flexibility of the six municipal minimum measures should avoid encouragement of development into rural rather than urban areas. For example, as part of the post-construction minimum measure, EPA recommends that municipalities consider policies and ordinances that encourage infill development in higher density urban areas, and areas with existing infrastructure, in order to meet the measure's intent.

EPA also received several comments expressing concern that incorporating "smart growth" incentives threatened the autonomy of local governments. One commenter was worried that "incentives" could become more onerous than the minimum measures. EPA is very aware of municipal concerns about possible federal interference with local land use planning. EPA is also cognizant of the difficulty surrounding incentives for "smart growth" activities due to these concerns. However, the Agency believes it has addressed these concerns by proposing a flexible approach and will continue to support the concept of "smart growth" by encouraging policies that limit the adverse impacts of growth and development on water quality.

### 3. Provide Financial Assistance

Although Congress has not established a fund to fully finance implementation of the proposed extension of the existing NPDES storm water program under CWA section 402(p)(6), numerous federal financing programs (administered by EPA and other federal agencies) can provide some financial assistance. The primary funding mechanism is the Clean Water State Revolving Fund (SRF) program, which provides sources of low-cost financing for a range of water quality infrastructure projects, including storm water. In addition to the SRF, federal financial assistance programs include the

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Water Quality Cooperative Agreements under CWA section 104(b)(3), Water Pollution Control Program grants to States under CWA section 106, and the Transportation Equity Act for the 21st Century (TEA-21) among others. In addition, Section 319 funds may be used to fund any urban storm water activities that are not specifically required by a draft or final NPDES permit. EPA will develop a list of potential funding sources as part of the tool box implementation effort. EPA anticipates that some of these programs will provide funds to help develop and, in limited circumstances, implement the CWA section 402(p)(6) storm water discharge control program.

EPA received numerous comments that requested additional funding. Congress provided one substantial new source of potential funding for transportation related storm water projects-TEA-21. The Department of Transportation has included a number of water-related provisions in its TEA-21 planning. These include Transportation Enhancements, Environmental Restoration and Pollution Abatement, and Environmental Streamlining. More information on TEA-21 is available at the following internet sites: [www.fhwa.dot.gov/tea21/outreach.htm](http://www.fhwa.dot.gov/tea21/outreach.htm) and [www.tea21.org](http://www.tea21.org).

#### 4. Implement the Program in Jurisdictions Not Authorized To Administer the NPDES Program

Because today's final rule uses the NPDES framework, EPA will be the NPDES permitting authority in several States, Tribal jurisdictions, and Territories. As such, EPA will have the same responsibilities as any other NPDES permitting authority-issuing permits, designating additional sources, and taking appropriate enforcement actions-and will seek to tailor the storm water discharge control program to the specific needs in that State, Tribal jurisdiction, or Territory. EPA also plans to provide support and oversight, including outreach, training, and technical assistance to the regulated communities. Section II.G. of today's preamble provides a separate discussion related to the NPDES permitting authority's responsibilities for today's final rule.

#### 5. Oversee State and Tribal Programs

Under the NPDES program, EPA plays an oversight role for NPDES-approved States and Tribes. In this role, EPA and the State or Tribe work together to implement, enforce, and improve the NPDES program. Part of this oversight role includes working with States and Tribes to modify their programs where programmatic or implementation concerns impede program effectiveness. This role will be vitally important when States and Tribes make adjustments to develop, implement, and enforce today's extension of the existing NPDES storm water discharge control program. In addition, States maintain a continuing planning process (CPP) under CWA section 303(e), which EPA periodically reviews to assess the program's achievements.

In its oversight role, EPA takes action to address States and Tribes who have obtained NPDES authorization but are not fulfilling their obligations under the NPDES program. If an NPDES-authorized State or Tribe fails to implement an adequate NPDES storm water program, for example, EPA typically enters into extensive discussions to resolve outstanding issues. EPA has the authority to withdraw the entire NPDES program when resolution cannot be reached. Partial program withdrawal is not provided for under the CWA except for partial approvals.

EPA is also working with the States and Tribes to improve nonpoint source management programs and assessments to incorporate key program elements. Key nonpoint source program elements include setting short and long term goals and objectives; establishing public and private partnerships; using a balanced approach incorporating Statewide and watershed-wide abatement of existing impairments; preventing future impairments; developing processes to address both impaired and threatened waters; reviewing and upgrading all program components, including program revisions on a 5-year cycle; addressing federal land management and activities inconsistent with State programs; and managing State nonpoint source management programs effectively.

In particular, EPA works with the States and Tribes to strengthen their nonpoint source pollution programs to address all significant nonpoint sources, including agricultural sources, through the CWA section 319 program. EPA is working with other government agencies, as well as with community groups, to effect voluntary changes regarding watershed protection and reduced nonpoint source pollution.

In addition, EPA and NOAA have published programmatic and technical guidance to address coastal nonpoint source pollution. Under Section 6217 of the CZARA, States are developing and implementing coastal nonpoint pollution control programs approved by EPA and NOAA. [\*68743]

#### 6. Comply With Applicable Requirements as a Discharger

Today's final rule covers federally operated facilities in a variety of ways. These facilities are generally areas where people reside, such as a federal prison, hospital, or military base. It also includes federal parkways and road systems with separate storm sewer systems. Today's rule requires federal MS4s to comply with the same application deadlines that apply to regulated small MS4s generally. EPA believes that all federal MS4s serve populations of less than 100,000.

EPA received several comments that asked if individual buildings like post offices are considered to be small MS4s and thereby regulated in today's rule if they are in an urbanized area. Most of these buildings have at most a parking lot with runoff or a storm sewer that connects with a municipality's MS4. EPA does not intend that individual federal buildings be considered to be small MS4s. This is discussed in section II.H.2.b. of today's preamble.

Federal facilities can also be included under requirements addressing storm water discharges associated with small construction activities. In any case, discharges from these facilities will need to comply with all applicable NPDES requirements and any additional water quality-related requirements imposed by a State, Tribal, or local government. Failure to comply can result in enforcement actions. Federal facilities can act as models for municipal and private sector facilities and implement or test state-of-the-art management practices and control measures.

#### *E. State Role*

Today's final rule sets forth an NPDES approach for implementing the extension of the existing storm water discharge control program under CWA section 402(p)(6). State assumption of the NPDES program is voluntary, consistent with the principles of federalism. Because most States are approved to implement the NPDES program, they will tailor their storm water discharge control programs to address their water quality needs and objectives. While today's rule establishes the basic framework for the section 402(p)(6) program, States as well as Tribes (see discussion in section II.F) have an important role in fine-tuning the program to address the water quality issues within their jurisdictions. The basic framework allows for adjustments based on factors that vary geographically, including climate patterns and terrain.

Where States do not have NPDES authority, they are not required to implement the storm water discharge control program, but they may still participate in water quality protection through participation in the CWA section 401 certification process (for any permits) and through development of water quality standards and TMDLs.

#### *1. Develop the Program*

In expanding the existing NPDES program for storm water discharges, States must evaluate whether revisions to their NPDES programs are necessary. If so, modifications must be made in accordance with § 123.62. Under § 123.62, States must revise their NPDES programs within 1 year, or within 2 years if statutory changes are necessary.

Some States and departments of transportation (DOTs) commented that this timeframe is too short, anticipating that the State legislative process and the modification of regulations combined would take beyond 2 years. The deadline language in § 123.62 is not new language for the storm water discharge control program; it applies to all NPDES programs. EPA believes the vast majority of States will meet the deadline and will work with States in those cases where there may be difficulty meeting this deadline due to the timing of legislative sessions and the regulatory development process.

An authorized State NPDES program must meet the requirements of CWA section 402(b) and conform to the guidelines issued under CWA section 304(i)(2). Today's final rule under § 123.25 adds specific cross references to the storm water discharge control program components to ensure that States adequately address these requirements.

#### *2. Comply With Applicable Requirements as a Discharger*

Today's final rule covers State operated separate storm sewer systems in a variety of ways. These systems generally drain areas where people reside, such as a prison, hospital, or other populated facility. These systems are included under the definition of a regulated small MS4, which specifically identifies systems operated by State departments of transportation. Alternatively, storm water discharges from State activities may be regulated under the section addressing storm water discharges associated with small construction activities. In any case, discharges from these facilities must comply with all applicable NPDES requirements. Failure to comply can result in enforcement actions. State facilities can act as models for municipal and private sector facilities and implement or test state-of-the-art management practices and control measures.

### 3. Communicate With EPA

Under approved NPDES programs, States have an ongoing obligation to share information with EPA. This dialogue is particularly important in the CWA section 402(p)(6) storm water program where these governments continue to develop a great deal of the guidance and outreach related to water quality.

#### *F. Tribal Role*

The proposal to today's final rule provides background information on EPA's 1984 Indian Policy and the criteria for treatment of an Indian Tribe in the same manner as a State. Today's final rule extends the existing NPDES program for storm water discharges to two types of dischargers located in Indian country. First, the final rule designates storm water discharges from any regulated small MS4, including Tribal systems. Second, the final rule regulates discharges associated with construction activity disturbing between one and five acres of land, including sites located in Indian country. Operators in each of these categories of regulated activity must apply for coverage under an NPDES permit by 3 years and 90 days from the date of publication of today's final rule. Under existing regulations, however, EPA or an authorized NPDES Tribe may require a specified storm water discharger to apply for NPDES permit coverage before this deadline based on a determination that the discharge is contributing to a violation of a water quality standard (including designated uses) or is a significant contributor of pollutants.

Under today's rule, a Tribal governmental entity may regulate storm water discharges on its reservation in two ways—as either an NPDES-authorized Tribe or as a regulated MS4. If a Tribe is authorized to operate the NPDES program, the Tribe must implement today's final rule for the NPDES program for storm water for covered dischargers located within the EPA recognized boundaries. Otherwise, EPA is generally the permitting/program authority within Indian country. Discussions about the State Role in the preceding section also apply to NPDES authorized Tribes. For additional information on the role and responsibilities of the permitting authority in the NPDES storm water program, see § 123.35 (and Section II.G. of today's preamble) and § 123.25(a). [\*68744]

Under today's final rule, if the Indian reservation is located entirely or partially within an "urbanized area," as defined in § 122.32(a)(1), the Tribe must obtain an NPDES permit if it operates a small MS4 within the urbanized area portion. Tribal MS4s located outside an urbanized area are not automatically covered, but may be designated by EPA pursuant to § 122.32(a)(2) of today's rule or may request designation as a regulated small MS4 from EPA. A Tribe that is a regulated MS4 for NPDES program purposes is required to implement the six minimum control measures to the extent allowable under Federal law.

The Tribal representative on the Storm Water Phase II FACA Subcommittee asked EPA to provide a list of the Tribes located in urbanized areas that would fall within the NPDES storm water program under today's final rule. In December 1996, EPA developed a list of federally recognized American Indian Areas located wholly or partially in Bureau of the Census-designated urbanized areas (see Appendix 1). Appendix 1 not only provides a listing of reservations and individual Tribes, but also the name of the particular urbanized area in which the reservation is located and an indication of whether the urbanized area contains a medium or large MS4 that is already covered by the existing Phase I regulations.

Some of the Tribes listed in Appendix 1 are only partially located in an urbanized area. If the Tribe's MS4 serves less than 1,000 people within an urbanized area, the permitting authority may waive the Tribe's MS4 storm water requirements if it meets the conditions of § 122.32(c). EPA does not have information on the Tribal populations within the urbanized areas, so it can not identify the Tribes that are eligible for a waiver. Therefore, a Tribe that believes it qualifies for a waiver should contact its permitting authority.

#### *G. NPDES Permitting Authority's Role for the NPDES Storm Water Small MS4 Program*

As noted previously, the NPDES permitting authority can be EPA or an authorized State or an authorized Tribe. The following discussion describes the role of the NPDES permitting authority under today's final rule.

##### 1. Comply With Implementation Requirements

NPDES permitting authorities must perform certain duties to implement the NPDES storm water municipal program. Section 123.35(a) of today's final rule emphasizes that permitting authorities have existing obligations under the

NPDES program. Section 123.35 focuses on specific issues related to the role of the NPDES authority to support administration and implementation of the municipal storm water program under CWA section 402(p)(6).

## 2. Designate Sources

Section 123.35(b) of today's final rule addresses the requirements for the NPDES permitting authority to designate sources of storm water discharges to be regulated under §§ 122.32 through 122.36. NPDES permitting authorities must develop a process, as well as criteria, to designate small MS4s. They must also have the authority to designate a small MS4 if and when circumstances that support a waiver under § 122.32(c) change. EPA may make designations if an NPDES-approved State or Tribe fails to do so.

NPDES permitting authorities must examine geographic jurisdictions that they believe should be included in the storm water discharge control program but are not located in an "urbanized area". Small MS4s in these areas are not designated automatically. Discharges from such areas should be brought into the program if found to have actual or potential exceedances of water quality standards, including impairment of designated uses, or other adverse impacts on water quality, as determined by local conditions or watershed and TMDL assessments. EPA's aim is to address discharges to impaired waters and to protect waters with the potential for problems. EPA encourages NPDES permitting authorities, local governments, and the interested public to work together in the context of a watershed plan to address water quality issues, including those associated with municipal storm water runoff.

EPA received comments stating that the process of developing criteria and applying it to all MS4s outside an urbanized area serving a population of 10,000 or greater and with a density of 1,000 people per square mile is too time-consuming and resource-intensive. These commenters believe that the permitting authority should decide which MS4s must be brought into the storm water discharge control program and that population and density should not be an overriding criteria. One suggested way of doing so was to only designate MS4s with demonstrated contributions to the impairment of water quality uses as shown by a TMDL. EPA disagrees with this suggestion. The TMDL process is time-consuming. MS4s outside of urbanized areas may cause water quality problems long before a TMDL is completed.

EPA believes that permitting authorities should consider the potential water quality impacts of storm water from all jurisdictions with a population of 10,000 or greater and a density of 1,000 people per square mile. EPA is using data summarized in the NURP study and in the CWA section 305(b) reports to support this approach for targeted designation outside of urbanized areas. EPA is not mandating which criteria are to be used, but has provided examples of criteria that may be useful in evaluating potential water quality impacts. EPA believes that the flexibility provided in this section of today's final rule allows the permitting authority to develop criteria and a designation process that is easy to use and protects water quality. Therefore, the provisions of § 123.35(b) remain as proposed.

### a. Develop Designation Criteria

Under § 123.35(b), the NPDES permitting authority must establish designation criteria to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including adverse habitat and biological impacts.

EPA recommends that NPDES permitting authorities consider, in a balanced manner, certain locally-focused criteria for designating any MS4 located outside of an urbanized area on the basis of significant water quality impacts. EPA recommends consideration of criteria such as discharge to sensitive waters, high growth or growth potential, high population density, contiguity to an urbanized area, significant contribution of pollutants to waters of the United States, and ineffective control of water quality concerns by other programs. These suggested designation criteria are intended to help encourage the permitting authority to use an objective method for identifying and designating, on a local basis, sources that adversely impact water quality. More information about these criteria and the reasons why they are suggested by EPA is included in the January 9, 1998, proposal (63 FR 1561) for today's final rule.

The suggested criteria are meant to be taken in the aggregate, with a great deal of flexibility as to how each should be weighed in order to best account for watershed and other local conditions and to allow for a more tailored case-by-case analysis. The application of criteria is meant to be geographically specific. Furthermore, each criterion does not have to be met in order for a small MS4 [\*68745] to qualify for designation, nor should an MS4 necessarily be designated on the basis of one or two criteria alone.

EPA believes that the application of the recommended designation criteria provides an objective indicator of real and potential water quality impacts from urban runoff on both the local and watershed levels. EPA encourages the ap-

plication of the recommended criteria in a watershed context, thereby allowing for the evaluation of the water quality impacts of the portions of a watershed outside of an urbanized area. For example, situations exist where the urbanized area represents a small portion of a degraded watershed, and the adjacent nonurbanized areas of the watershed have significant cumulative effects on the quality of the receiving waters.

EPA received numerous suggestions of additional criteria that should be added and reasons why some of the criteria in the proposal to today's final rule were not appropriate. EPA developed its suggested designation criteria based on findings of the NURP study and other studies that indicate pollutants of concern, including total suspended solids, chemical oxygen demand, and temperature. These criteria were the subject of considerable discussion by the Storm Water Phase II FACA Subcommittee. EPA developed them in response to recommendations from the subcommittee during development of the proposed rule. The listed criteria are only suggestions. Permitting authorities are required to develop their own criteria. EPA has not found any reason to change its suggested list of criteria and the suggestions remain as proposed.

#### b. Apply Designation Criteria

After customizing the designation criteria for local conditions, the permitting authority must apply such criteria, at a minimum, to any MS4 located outside of an urbanized area serving a jurisdiction with a population of at least 10,000 and a population density of 1,000 people per square mile or greater (see § 123.35(b)(2)). If the NPDES permitting authority determines that an MS4 meets the criteria, the permitting authority must designate it as a regulated small MS4. This designation must occur within 3 years of publication of today's final rule. Alternatively, the NPDES authority can designate within 5 years from the date of final regulation if the designation criteria are applied on a watershed basis where a comprehensive watershed plan exists (a comprehensive watershed plan is one that includes the equivalents of TMDLs) (see § 123.35(b)(3)). The extended 5 year deadline is intended to provide incentives for watershed-based designations. If an NPDES-authorized State or Tribe does not develop and apply designation criteria within this timeframe, then EPA has the opportunity to do so in lieu of the authorized State or Tribe.

NPDES permitting authorities can designate any small MS4, including one below 10,000 in population and 1,000 in density. EPA established the 10,000/1,000 threshold based on the likelihood of adverse water quality impacts at these population and density levels. In addition, the 1,000 persons per square mile threshold is consistent with both the Bureau of the Census definition of an "urbanized area" (see Section II.H.2. below) and stakeholder discussions concerning the definition of a regulated small MS4.

One commenter requested that EPA develop interim deadlines for development of designation criteria. EPA believes that the designation deadline identified in today's final rule at § 123.35(b)(3) provides States and Tribes with a flexibility that allows them to develop and apply the criteria locally in a timely fashion, while at the same time establishing an expeditious deadline.

#### c. Designate Physically Interconnected Small MS4s

In addition to applying criteria on a local basis for potential designation, the NPDES permitting authority must designate any MS4 that contributes substantially to the pollutant loadings of a physically interconnected municipal separate storm sewer that is regulated by the NPDES program for storm water discharges (see § 123.35(b)(4)). To be "physically interconnected," the MS4 of one entity, including roads with drainage systems and municipal streets, is physically connected directly to the municipal separate storm sewer of another entity. This provision applies to all MS4s located outside of an urbanized area. EPA added this section in recognition of the concerns of local government stakeholders that a local government should not have to shoulder total responsibility for a storm water program when storm water discharges from another MS4 are also contributing pollutants or adversely affecting water quality. This provision also helps to provide some consistency among MS4 programs and to facilitate watershed planning in the implementation of the NPDES storm water program. EPA recommended physical interconnectedness in the existing NPDES storm water regulations as a factor for consideration in the designation of additional sources.

Today's final rule does not include interim deadlines for identifying physically interconnected MS4s. However, consistent with the deadlines identified in § 123.35(b)(3) of today's final rule, EPA encourages the permitting authority to make these determinations within 3 years from the date of publication of the final rule or within 5 years if the permitting authority is implementing a comprehensive watershed plan. Alternatively, the affected jurisdiction could use the petition process under *40 CFR 122.26(f)* in seeking to have the permitting authority designate the contributing jurisdiction.

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Several commenters expressed concerns about who could be designated under this provision (§ 123.35(b)(4)). One commenter requested that the word "substantially" be deleted from the rule because they believe any MS4 that contributes at all to a physically interconnected municipal separate storm sewer should be regulated. EPA believes that the word "substantially" provides necessary flexibility to the permitting authorities. The permitting authority can decide if an MS4 is contributing discharges to another municipal separate storm sewer in a manner that requires regulation. If the operator of a regulated municipal separate storm sewer believes that some of its pollutant loadings are coming from an unregulated MS4, it can petition the permitting authority to designate the unregulated MS4 for regulation.

#### d. Respond to Public Petitions for Designation

Today's final rule reiterates the existing opportunity for the public to petition the permitting authority for designation of a point source to be regulated to protect water quality. The petition opportunity also appears in existing NPDES regulations at *40 CFR 122.26(f)*. Any person may petition the permitting authority to require an NPDES permit for a discharge composed entirely of storm water that contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States (see § 123.32(b)). The NPDES permitting authority must make a final determination on any petition within 180 days after receiving the petition (see § 123.35(c)). EPA believes that a 180 day limit balances the public's need for a timely final determination with the NPDES permitting authority's need to prioritize its workload. If an NPDES-approved State or Tribe fails to act [\*68746] within the 180-day time-frame, EPA may make a determination on the petition. EPA believes that public involvement is an important component of the NPDES program for storm water and feels that this provision encourages public participation. Section II.K, Public Involvement/Public Role, further discusses this topic.

### 3. Provide Waivers

Today's rule provides two opportunities for the NPDES permitting authority to exempt certain small MS4s from the need for a permit based on water quality considerations. See §§ 122.32(d) and (e). The two waiver opportunities have different size thresholds and take different approaches to considering the water quality impacts of discharges from the MS4.

In the proposal, EPA requested comment on the option of waiving coverage for all MS4s with less than 1,000 people unless the permitting authority determined that the small MS4 should be regulated based on significant adverse water quality impacts. A number of commenters supported this option. They expressed concern that compliance with the rule requirements and certification of one of the waiver provisions were both costly for very small communities. They stated that the permitting authority should identify a water quality problem before requiring compliance. Today's rule essentially adopts this alternative approach for MS4s serving a population under 1,000.

The final rule has expanded the waiver provision that EPA proposed for small MS4s with a population less than 1,000. The proposed rule would have required a small MS4 operator to certify that storm water controls are not needed based on either wasteload allocations that are part of TMDLs that address the pollutants of concern, or a comprehensive watershed plan implemented for the waterbody that includes the equivalents of TMDLs and addresses the pollutant(s) of concern. Commenters noted that the proposed waivers would be unattainable if a TMDL or equivalent analysis was required for every pollutant that could possibly be present in any amount in discharges from an MS4 regardless of whether the pollutant is causing water quality impairment. Commenters asked that EPA identify what constitutes the "pollutant(s) of concern" for which a TMDL or its equivalent must be developed. For example, § 122.30(c) indicates that the MS4 program is intended to control "sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables." Commenters asked whether TMDLs or equivalent analyses have to address all of these.

EPA has revised the proposed waiver in response to these concerns. Under today's rule, NPDES permitting authorities may waive the requirements of today's rule for any small MS4 with a population less than 1,000 that does not contribute substantially to the pollutant loadings of a physically interconnected MS4, unless the small MS4 discharges pollutants that have been identified as a cause of impairment of the waters to which the small MS4 discharges. If the small MS4 does discharge pollutants that have been identified as impairing the water body into which the small MS4 discharges, the NPDES permitting authority may grant a waiver only if it determines that storm water controls are not needed based on an EPA approved or established TMDL that addresses the pollutant(s) of concern.

Unlike the proposed rule, § 122.32(d) does not allow the waiver for MS4s serving a population under 1,000 to be based on "the equivalent of a TMDL." Because § 122.32(d) requires a pollutant specific analysis only for a pollutant

that has been identified as a cause of impairment, a TMDL is required for such pollutant before the waiver may be granted. Once a pollutant has been identified as the cause of impairment of a water body, the State should develop a TMDL for that pollutant for that water body. Thus, § 122.32(d) takes a different approach than that taken for the waiver in § 122.32(e) for MS4s serving a population under 10,000, which can be based upon an analysis that is "the equivalent of a TMDL." This is because § 122.32(d) requires an analysis to support the waiver for MS4s under 1,000 only if a waterbody to which the MS4 discharges has been identified as impaired. The § 122.32(e) waiver, on the other hand, would be available for larger MS4s but only after the State affirmatively establishes lack of impairment based upon a comprehensive analysis of smaller urban waters that might not otherwise be evaluated for the purposes of CWA section 303. Since § 122.32(e) requires the analysis of waters that have not been identified as impaired, an actual TMDL is not required and an analysis that is the equivalent of a TMDL can suffice to support the waiver.

Where a State is the NPDES permitting authority, the permitting authority is responsible for the development of the TMDLs as well as the assessment of the extent to which a small MS4's discharge contributes pollutants to a neighboring regulated system. In States where EPA is the permitting authority, EPA will use a State's TMDLs to determine whether storm water controls are required for the small MS4s.

The proposed rule would have required the operator of the small MS4 serving a population under 1,000 to certify that its discharge was covered under a TMDL that indicated that discharges from its particular system were not having an adverse impact on water quality (*i.e.*, it was either not assigned wasteload allocations under TMDLs or its discharge is within an assigned allocation). Many commenters expressed concerns that MS4 operators serving less than 1,000 persons may lack the technical capacity to certify that their discharges are not contributing to adverse water quality impacts. These commenters thought that the permitting authority should make such a certification. Today's rule provides flexibility as to how the waiver is administered. Permitting authorities are ultimately responsible for granting the waiver, but are free to determine whether or not to require small MS4 operators that are seeking waivers to submit information or a written certification.

Under § 122.32(e) a State may grant a waiver to an MS4 serving a population between 1,000 and 10,000 only if the State has made a comprehensive effort to ensure that the MS4 will not cause or contribute to water quality impairment. To grant a § 122.32(e) waiver, the NPDES permitting authority must evaluate all waters of the U.S. that receive a discharge from the MS4 and determine that storm water controls are not needed. The permitting authority's evaluation must be based on wasteload allocations that are part of an EPA approved or established TMDL or, if a TMDL has not been developed or approved, an equivalent analysis that determines sources and allocations for the pollutant(s) of concern. The pollutants of concern that the permitting authority must evaluate include biochemical oxygen demand (BOD), sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation), pathogens, oil and grease, and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the MS4. Finally, the permitting authority must have determined that future discharges from the MS4 do not have the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant [\*68747] water quality impacts, including habitat and biological impacts.

Although EPA did not propose this specific approach, the Agency did request comment on whether to increase the proposed 1,000 population threshold for a waiver. The § 122.32(e) waiver was developed in response to comments, including States' concerns that they needed greater flexibility to focus their efforts on MS4s that were causing water quality impairment. Several commenters thought that the threshold should be increased from 1,000 to 5,000 or 10,000. Others suggested additional ways of qualifying for a waiver for MS4s that discharge to waters that are not covered by a TMDL or watershed plan. EPA carefully considered all the options for expanding the waiver provisions and has decided to expand the waiver only in the very narrow circumstances described above where a comprehensive analysis has been undertaken to demonstrate that the MS4 is not causing water quality impairment.

The NPDES permitting authority can, at any time, mandate compliance with program requirements from a previously waived small MS4 if circumstances change. For example, a waiver can be withdrawn in circumstances where the permitting authority later determines that a waived small MS4's storm water discharge to a small stream will cause adverse impacts to water quality or significantly interfere with attainment of water quality standards. A "change in circumstances" could involve receipt of new information. Changed circumstances can also allow a regulated small MS4 operator to request a waiver at any time.

Some commenters expressed concerns about allowing any small MS4 waivers. One commenter stated that storm water pollution prevention plans are necessary to control storm water pollution and should be required from all regulated small MS4s. For the reasons stated in the Background section above, EPA agrees that the discharges from most



MS4s in urbanized areas should be addressed by a storm water management program outlined in today's rule. For MS4s serving very small areas, however, the TMDL development process provides an opportunity to determine whether an MS4 serving a population less than 1,000 is having a negative impact on any receiving water that is impaired by a pollutant that the MS4 discharges. MS4s serving populations up to 10,000 may receive a waiver only if a comprehensive analysis of its impact on receiving water has been performed.

Other commenters said that waivers should not be allowed for small MS4s that discharge into another regulated MS4. These commenters stated that the word "substantially" should be removed from § 122.32(d)(i) so that a waiver would not be allowed for any system "contributing to the storm water pollutant loadings of a physically interconnected regulated MS4." As previously mentioned under the designation discussion of section II.G.2.c, EPA believes that the word "substantially" provides needed flexibility to the permitting authorities. It is important to note that this is only one aspect that the permitting authority must consider when deciding on the appropriateness of a waiver.

#### 4. Issue Permits

NPDES permitting authorities have a number of responsibilities regarding the permit process. Sections 123.35(d) through (g) ensure a certain level of consistency for permits, yet provide numerous opportunities for flexibility. NPDES permitting authorities must issue NPDES permits to cover municipal sources to be regulated under § 122.32, unless waived under § 122.32(c). EPA encourages permitting authorities to use general permits as the vehicle for permitting and regulating small MS4s. The Agency notes, however, that some operators may wish to take advantage of the option to join as a co-permittee with an MS4 regulated under the existing NPDES storm water program.

Today's final rule includes a provision, § 123.35(f), that requires NPDES permitting authorities to either include the requirements in § 122.34 for NPDES permits issued for regulated small MS4s or to develop permit limits based on a permit application submitted by a small MS4. See Section II.H.3.a, Minimum Control Measures, for more details on the actual § 122.34 requirements. See Section II.H.3.c for alternative and joint permitting options.

In an attempt to avoid duplication of effort, § 122.34(c) allows NPDES permitting authorities to include permit conditions that direct an MS4 to meet the requirements of a qualifying local, Tribal, or State municipal storm water management program. For a local, Tribal, or State program to "qualify," it must impose, at a minimum, the relevant requirements of § 122.34(b). A regulated small MS4 must still follow the procedural requirements for an NPDES permit (*i.e.*, submit an application, either an individual application or an NOI under a general permit) but will instead follow the substantive pollutant control requirements of the qualifying local, Tribal, or State program.

Under § 122.35(b), NPDES permitting authorities may also recognize existing responsibilities among governmental entities for the minimum control measures in an NPDES small MS4 storm water permit. For example, the permit might acknowledge the existence of a State administered program that addresses construction site runoff and require that the municipalities only develop substantive controls for the remaining minimum control measures. By acknowledging existing programs, this provision is meant to reduce the duplication of efforts and to increase the flexibility of the NPDES storm water program.

Section 123.35(e) of today's final rule requires permitting authorities to specify a time period of up to 5 years from the issuance date of an NPDES permit for regulated small MS4 operators to fully develop and implement their storm water programs. As discussed more fully below, permitting authorities should be providing extensive support to the local governments to assist them in developing and implementing their programs.

In the proposed rule, EPA stated that the permitting authority would develop the menu of BMPs and if they failed to do so, EPA would develop the menu. Commenters felt that EPA should develop a menu of BMPs, rather than just providing guidance. In the settlement agreement for seeking an extension to the deadline for issuing today's rule, EPA committed to developing a menu of BMPs by October 27, 2000. Permitting authorities can adopt EPA's menu or develop their own. The menu itself is not intended to replace more comprehensive BMP guidance materials. As part of the tool box efforts, EPA will provide separate guidance documents that discuss the results from EPA-sponsored nationwide studies on the design, operation and maintenance of BMPs. Additionally, EPA expects that the new rulemaking on construction BMPs may provide more specific design, operation and maintenance criteria.

#### 5. Support and Oversee the Local Programs

NPDES permitting authorities are responsible for supporting and overseeing the local municipal programs. Section 123.35(h) of today's final rule highlights issues associated with these responsibilities.

To the extent possible, NPDES permitting authorities should provide financial assistance to MS4s, which [\*68748] often have limited resources, for the development and implementation of local programs. EPA recognizes that funding for programs at the State and Tribal levels may also be limited, but strongly encourages States and Tribes to provide whatever assistance is possible. In lieu of actual dollars, NPDES permitting authorities can provide cost-cutting assistance in a number of ways. For example, NPDES permitting authorities can develop outreach materials for MS4s to distribute or the NPDES permitting authority can actually distribute the materials. Another option is to implement an erosion and sediment control program across an entire State (or Tribal land), thus alleviating the need for the MS4 to implement its own program. The NPDES permitting authority must balance the need for site-specific controls, which are best handled by a local MS4, with its ability to offer financial assistance. EPA, States, Tribes, and MS4s should work as a team in making these kinds of decisions.

NPDES permitting authorities are responsible for overseeing the local programs. Permitting authorities should work with the regulated community and other stakeholders to assist in local program development and implementation. This might include sharing information, analyzing reports, and taking enforcement actions, as necessary. NPDES permitting authorities play a vital role in supporting local programs by providing technical and programmatic assistance, conducting research projects, and monitoring watersheds. The NPDES permitting authority can also assist the MS4 permittee in obtaining adequate legal authority at the local level in order to implement the local component of the CWA section 402(p)(6) program.

NPDES permitting authorities are encouraged to coordinate and utilize the data collected under several programs. States and Tribes address point and nonpoint source storm water discharges through a variety of programs. In developing programs to carry out CWA section 402(p)(6), EPA recommends that States and Tribes coordinate all of their water pollution evaluation and control programs, including the continuing planning process under CWA section 303(e), the existing NPDES program, the CZARA program, and nonpoint source pollution control programs.

In addition, NPDES permitting authorities are encouraged to provide a brief (*e.g.*, two-page) reporting format to facilitate compilation and analysis of data from reports submitted under § 122.34(g)(3). EPA intends to develop a model form for this purpose.

#### *H. Municipal Role*

##### **I. Scope of Today's Rule**

Today's final rule attempts to establish an equitable and comprehensive four-pronged approach for the designation of municipal sources. First, the approach defines for automatic coverage the municipal systems believed to be of highest threat to water quality. Second, the approach designates municipal systems that meet a set of objective criteria used to measure the potential for water quality impacts. Third, the approach designates on a case-by-case basis municipal systems that "contribute substantially to the pollutant loadings of a physically-interconnected [regulated] MS4." Finally, the approach designates on a case-by-case basis, upon petition, municipal systems that "contribute to a violation of a water quality standard or are a significant contributor of pollutants."

Today's final rule automatically designates for regulation small MS4s located in urbanized areas, and requires that NPDES permitting authorities examine for potential designation, at a minimum, a particular subset of small MS4s located outside of urbanized areas. Today's rule also includes provisions that allow for waivers from the otherwise applicable requirements for the smallest MS4s that are not causing impairment of a receiving water body. Qualifications for the waivers vary depending on whether the MS4 serves a population under 1,000 or a population under 10,000. See §§ 122.32(d) and (e). These waivers are discussed further in section II.G.3. Any small MS4 automatically designated by the final rule or designated by the permitting authority under today's final rule is defined as a "regulated" small MS4 unless it receives a waiver.

In today's final rule, all regulated small MS4s must establish a storm water discharge control program that meets the requirements of six minimum control measures. These minimum control measures are public education and outreach on storm water impacts, public involvement participation, illicit discharge detection and elimination, construction site storm water runoff control, post-construction storm water management in new development and redevelopment, and pollution prevention/good housekeeping for municipal operations.

Today's rule allows for a great deal of flexibility in how an operator of a regulated small MS4 is authorized to discharge under an NPDES permit, by providing various options for obtaining permit coverage and satisfying the required minimum control measures. For example, the NPDES permitting authority can incorporate by reference qualifying

State, Tribal, or local programs in an NPDES general permit and can recognize existing responsibilities among different governmental entities for the implementation of minimum control measures. In addition, a regulated small MS4 can participate in the storm water management program of an adjoining regulated MS4 and can arrange to have another governmental entity implement a minimum control measure on their behalf.

## 2. Municipal Definitions

### a. Municipal Separate Storm Sewer Systems (MS4s)

The CWA does not define the term "municipal separate storm sewer." EPA defined municipal separate storm sewer in the existing storm water permit application regulations to mean, in part, a conveyance or system of conveyances (including roads with drainage systems and municipal streets) that is "owned or operated by a State, city, town borough, county, parish, district, association, or other public body \* \* \* designed or used for collecting or conveying storm water which is not a combined sewer and which is not part of a Publicly Owned Treatment Works as defined at 40 CFR 122.2" (see § 122.26(b)(8)(i)). Section 122.26 contains definitions of medium and large municipal separate storm sewer systems but no definition of a municipal separate storm sewer *system*, even though the term MS4 is commonly used. In today's rule, EPA is adding a definition of municipal separate storm sewer system and small municipal separate storm sewer system along with the abbreviations MS4 and small MS4.

The existing municipal permit application regulations define "medium" and "large" MS4s as those located in an incorporated place or county with a population of at least 100,000 (medium) or 250,000 (large) as determined by the latest Decennial Census (see §§ 122.26(b)(4) and 122.26(b)(7)). In today's final rule, these regulations have been revised to define all medium and large MS4s as those meeting the above population thresholds according to the 1990 Decennial Census.

Today's rule also corrects the titles and contents of Appendices F, G, H, & I to Part 122. EPA is adding those incorporated places and counties whose 1990 population caused them to be defined as a "medium" or "large" MS4. All of these MS4s have applied for [\*68749] permit coverage so the effect of this change to the appendices is simply to make them more accurate. They will not need to be revised again because today's rule "freezes" the definition of "medium" and "large" MS4s at those that qualify based on the 1990 census.

EPA received several comments supporting and opposing the proposal to "freeze" the definitions based on the 1990 census. Commenters who disagreed with EPA's position cited the unfairness of municipalities that reach the medium or large threshold at a later date having fewer permitting requirements compared to those that were already at the population thresholds when the existing storm water regulations took effect. EPA recognizes this disparity but does not believe it is unfair, as explained in the proposed rule. The decision was based on the fact that the deadlines from the existing regulations have lapsed, and because the permitting authority can always require more from operators of MS4s serving "newly over 100,000" populations.

### b. Small Municipal Separate Storm Sewer Systems

The proposal to today's final rule added "the United States" as a potential owner or operator of a municipal separate storm sewer. This addition was intended to address an omission from existing regulations and to clarify that federal facilities are, in fact, covered by the NPDES program for municipal storm water discharges when the federal facility is like other regulated MS4s. EPA received a comment that this change would cause federal facilities located in Phase 1 areas to be considered Phase 1 dischargers due to the definition of medium and large MS4s. All MS4s located in Phase 1 cities or counties are defined as Phase 1 medium or large MS4s. EPA believes that all federal facilities serve a population of under 100,000 and should be regulated as small MS4s. Therefore, in § 122.26(a)(16) of today's final rule, EPA is adding federal facilities to the NPDES storm water discharge control program by changing the proposed definition of small municipal separate storm sewer system. Paragraph (i) of this section restates the definition of municipal separate storm sewer with the addition of "the United States" as a owner or operator of a small municipal separate storm sewer. Paragraph (ii) repeats the proposed language that states that a small MS4 is a municipal separate storm sewer that is not medium or large.

Most commenters agreed that federal facilities should be covered in the same way as other similar MS4s. However, EPA received several comments asking whether individual federal buildings such as post offices or urban offices of the U.S. Park Service must apply for coverage as regulated small MS4s. Most of these buildings have, at most, a parking lot with runoff or a storm sewer that connects with a municipality's MS4. In § 122.26(a)(16)(iii), EPA clarifies that the

definition of small MS4 does not include individual buildings. These buildings may have a municipal separate storm sewer but they do not have a "system" of conveyances. The minimum measures for small MS4s were written to apply to storm sewer "systems" providing storm water drainage service to human populations and not to individual buildings. This is true of municipal separate storm sewers from State buildings as well as from federal buildings.

There will likely be situations where the permitting authority must decide if a federal or State complex should be regulated as a small MS4. A federal complex of two or three buildings could be treated as a single building and not be required to apply for coverage. In these situations, permitting authorities will have to use their best judgment as to the nature of the complex and its storm water conveyance system. Permitting authorities should also consider whether the federal or State complex cooperates with its municipality's efforts to implement their storm water management program.

Along with the questions about individual buildings, EPA received many questions about how various provisions of the rule should be interpreted for federal and State facilities. EPA acknowledges that federal and State facilities are different from municipalities. EPA believes, however, that the minimum measures are flexible enough that they can be implemented by these facilities. As an example, DOD commenters asked about how to interpret the term "public" for military installations when implementing the public education measure. EPA agrees with the suggested interpretation of "public" for DOD facilities as "the resident and employee population within the fence line of the facility."

EPA also received many comments from State departments of transportation (DOTs) that suggested the ways in which they are different from municipalities and should therefore be regulated differently. Storm water discharges from State DOTs in Phase 1 areas should already be regulated under Phase I. The preamble to Phase 1 clearly states that "all systems within a geographical area including highways and flood control districts will be covered." Many permitting authorities regulated State DOTs as co-permittees with the Phase 1 municipality in which the highway is located. State DOTs that are already regulated under Phase I are not required to comply with Phase II. State DOTs that are not already regulated have various options for meeting the requirements of today's rule. These options are discussed in Section II.H.3.c.iv below. Several DOTs commented that some of the minimum measures are outside the scope of their mission or that they do not have the legal authority required for implementation. EPA believes that the flexibility of the minimum measures allows them to be implemented by most MS4s, including DOTs. When a DOT does not have the necessary legal authority, EPA encourages the DOT to coordinate their storm water management efforts with the surrounding municipalities and other State agencies. Under today's rule, DOTs can use any of the options of § 122.35 to share their storm water management responsibilities. DOTs may also want to work with their permitting authority to develop a State-wide DOT storm water permit.

There are many storm water discharges from State DOTs and other State MS4s located in Phase 1 areas that were not regulated under Phase 1. Today's rule adds many more State facilities as well as all federal facilities located in urbanized areas. All of these State and federal facilities that fit the definition of a small MS4 must be covered by a storm water management program. The individual permitting authorities must decide what type of permit is most applicable.

The existing NPDES storm water program already regulates storm water from federally or State-operated industrial sources. Federal or State facilities that are currently regulated due to their industrial discharges may already be implementing some of today's rule requirements.

EPA received comments that questioned the apparent inconsistency between regulating a federal facility such as a hospital and not regulating a similar private facility. Normally, this type of private facility is regulated by the MS4. EPA believes that federal facilities are subject to local water quality regulations, including storm water requirements, by virtue of the waiver of sovereign immunity in CWA section 313. However, there are special problems faced by MS4s in their efforts to regulate federal facilities that have not been encountered in regulating [\*68750] similar private facilities. To ensure comprehensive coverage, today's rule merely clarifies the need for permit coverage for these federal facilities.

*i. Combined Sewer Systems (CSS).* The definition of small MS4s does not include combined sewer systems. A combined sewer system is a wastewater collection system that conveys sanitary wastewater and storm water through a single set of pipes to a publicly-owned treatment works (POTW) for treatment before discharging to a receiving waterbody. During wet weather events when the capacity of the combined sewer system is exceeded, the system is designed to discharge prior to the POTW treatment plant directly into a receiving waterbody. Such an overflow is a combined sewer overflow or CSO. Combined sewer systems are not subject to existing regulations for municipal storm water discharges, nor will they be subject to today's regulations. EPA addresses combined sewer systems and CSOs in the National Combined Sewer Overflow (CSO) Control Policy issued on April 19, 1994 (59 FR 18688). The CSO Control Policy contains provisions for developing appropriate, site-specific NPDES permit requirements for combined sewer

systems. CSO discharges are subject to limitations based on the best available technology economically achievable for toxic pollutants and based on the best conventional pollutant control technology for conventional pollutants. MS4s are subject to a different technology standard for all pollutants, specifically to reduce pollutants to the maximum extent practicable.

Some municipalities are served by both separate storm sewer systems and combined sewer systems. If such a municipality is located within an urbanized area, only the separate storm sewer systems within that municipality is included in the NPDES storm water program and subject to today's final rule. If the municipality is not located in an urbanized area, then the NPDES permitting authority has discretion as to whether the discharges from the separate storm sewer system is subject to today's final rule. The NPDES permitting authority will use the same process to designate discharges from portions of an MS4 for permit coverage where the municipality is also served by a combined sewer system.

EPA recognizes that municipalities that have both combined and separate storm sewer systems may wish to find ways to develop a unified program to meet all wet weather water pollution control requirements more efficiently. In the proposal to today's final rule, EPA sought comment on ways to achieve such a unified program. Many municipalities that are served by CSSs and MS4s commented that it is inequitable to force them to comply with Phase II at this time because implementation of the CSO Control Policy through their NPDES permits already imposes a significant financial burden. They requested an extension of the implementation time frame. They did not provide ideas on how to unify the two programs. EPA encourages permitting authorities to work with these municipalities as they develop and begin implementation of their CSO and storm water management programs. If both sets of requirements are carefully coordinated early, a cost-effective wet weather program can be developed that will address both CSO and storm water requirements.

*ii. Owners/Operators.* Several commenters mentioned the difference between the existing storm water application requirement for municipal operators and the proposed municipal requirement for owners or operators to apply. They felt that this inconsistency is confusing. The preamble to the existing regulations makes numerous references to owner/operator so there was no intent to make a clear distinction between Phase I and Phase II. Section 122.21(b) states that when the owner and operator are different, the operator must obtain the permit. MS4s often have several operators. The owner may be responsible for one part of the system and a regional authority may be responsible for other aspects. EPA proposed the "owner or operator" language to convey this dual responsibility. However, when the owner is responsible for some part of a storm water management plan, it is also an operator.

EPA has revised the regulation language to clarify that "an operator" must apply for a permit. When responsibilities for the MS4 are shared, all operators must apply.

### c. Regulated Small MS4s

In today's final rule, all small MS4s located in an urbanized area are automatically designated as "regulated" small MS4s provided that they were not previously designated into the existing storm water program. Unlike medium and large MS4s under the existing storm water regulations, not all small MS4s are designated under today's final rule. Therefore, today's rule distinguishes between "small" MS4s and "regulated small" MS4s.

EPA's definition of "regulated small MS4s" in the proposal to today's rule included mention of incorporated places and counties. Along with the definition, EPA included Appendices 6 and 7 to assist in the identification of areas that would probably require coverage as "automatically designated" (Appendix 6) or "potentially designated" (Appendix 7). The definition and the appendices raised many questions about exactly who was required to comply with the proposed requirements. Commenters raised issues about the definition of "incorporated place" and the status of towns, townships, and other places that are not considered incorporated by the Census Bureau. They also asked about special districts, regional authorities, MS4s already regulated, and other questions in order to clarify the rule's coverage.

EPA has revised § 122.32(a) to clarify that discharges are regulated under today's rule if they are from a small MS4 that is in an urbanized area and has not received a waiver or they are designated by the permitting authority. Today's rule does not regulate the county, city, or town. Today's rule regulates the MS4. Therefore, even though a county may be listed in Appendix 6, if that county does not own or operate the municipal storm sewer systems, the county does not have to submit an application or develop a storm water management program. If another entity does own or operate an MS4 within the county, for example, a regional utility district, that other entity needs to submit the application and develop the program.

Some commenters suggested that EPA should change the rule language to specifically allow regional authorities to be the permitted entity and to allow small MS4s to apply as co-permittees. EPA believes that the best way to clarify that regional authorities can be the primary permitted entity is the change to § 122.32(a) and the explanation above. Because EPA assumes that today's regulation will be implemented through general permits, MS4s will not be co-permittees under a general permit in the same manner as under individual permits. EPA has added § 122.33(a)(4) and made a minor change to § 122.35(a) to clarify that small MS4s can work together to share the responsibilities of a storm water management program. This is discussed further in Section II.H.3.c.iv below.

The proposed rule stated that when a county or Federal Indian reservation is only partially included in an urbanized area, only MS4s in the urbanized portion of the county or Federal Indian reservation would be regulated. In the rare cases when an incorporated place is only partially included in the urbanized area, the entire incorporated place would be regulated. EPA received comments asking about towns and [\*68751] townships, because they were not considered to be incorporated areas according to the Census Bureau's definition. Would the whole town/township be covered or only the part of the town/township in the urbanized area? States use many different types of systems in their geographical divisions. Some towns are similar to incorporated cities and others are large areas that are more similar to counties. Some commenters thought that the urbanized area boundary was arbitrary, and if part of a town or county was covered, it all should be covered. Other commenters noted that some townships and counties encompass very large areas of which only a small portion is urbanized. Due to the great variety of situations, EPA has decided that for all geographical entities, only MS4s in the urbanized area are automatically designated. The population densities associated with the Census Bureau's designation of urbanized areas provide the basis for designation of these areas to protect water quality. This focused designation provides for consistency and allows for flexibility on the part of the MS4 and the permitting authority. In those situations where an incorporated place or a town is not all in an "urbanized area", there is a good possibility that it is served by more than one MS4. In those cases where the area is served by the same MS4, it makes sense to develop a storm water program for the whole area. Permitting authorities may also decide to designate all MS4s within a county or township, if they believe it is necessary to protect water quality.

Most operators of MS4s will not need to independently determine the status of coverage under today's rule. EPA has revised the proposed Appendices 6 and 7 to include towns and townships. Therefore, these appendices will alert most MS4s as to whether they are likely to be covered under today's rule. However, each permitting authority must make the decision as to who requires coverage. Most likely, an illustrative list of the regulated areas will be published with the general permit. If not, the operator can contact its permitting authority or the Bureau of the Census to find out if their separate storm sewer systems are within an urbanized area.

*i. Urbanized Area Description.* Under the Bureau of the Census definition of "urbanized area," adopted by EPA for the purposes of today's final rule, "an urbanized area (UA) comprises a place and the adjacent densely settled surrounding territory that together have a minimum population of 50,000 people." The proposal to today's rule provided the full definition and case studies to help explain the census category of "urbanized area." Appendix 2 is a simplified urbanized area illustration to help demonstrate the concept of urbanized areas in relation to today's final rule. The "urbanized area" is the shaded area that includes within its boundaries incorporated places, a portion of a Federal Indian reservation, portions of two counties, an entire town, and portions of another town. All small MS4s located in the shaded area are covered by the rule, unless and until waived by the permitting authority. Any small MS4s located outside of the shaded area are subject to potential designation by the permitting authority.

There are 405 urbanized areas in the United States that cover 2 percent of total U.S. land area and contain approximately 63 percent of the nation's population (see Appendix 3 for a listing of urbanized areas of the United States and Puerto Rico). These numbers include U.S. Territories, although Puerto Rico is the only territory to have Census-designated urbanized areas. Urbanized areas constitute the largest and most dense areas of settlement. The purpose of determining an "urbanized area" is to delineate the boundaries of development and map the actual built-up urban area. The Bureau of the Census geographers liken it to flying over an urban area and drawing a line around the boundary of the built-up area as seen from the air.

Using data from the latest decennial census, the Census Bureau applies the urbanized area definition nationwide (including U.S. Tribes and Territories) and determines which places and counties are included within each urbanized area. For each urbanized area, the Bureau provides full listings of who is included, as well as detailed maps and special CD-ROM files for use with computerized mapping systems (such as GIS). Each State's data center receives a copy of the list, and some maps, automatically. The States also have the CD-ROM files and a variety of publications available to them for reference from the Bureau of the Census. In addition, local or regional planning agencies may have urbanized

area files already. New listings for urbanized areas based on the 2000 Census will be available by July/August 2001, but the more comprehensive computer files will not be available until late 2001/early 2002.

Additional designations based on subsequent census years will be governed by the Bureau of the Census' definition of an urbanized area in effect for that year. Based on historical trends, EPA expects that any area determined by the Bureau of the Census to be included within an urbanized area as of the 1990 Census will not later be excluded from the urbanized area as of the 2000 Census. However, it is important to note that even if this situation were to occur, for example, due to a possible change in the Bureau of the Census' urbanized area definition, a small MS4 that is automatically designated into the NPDES program for storm water under an urbanized area calculation for any given Census year will remain regulated regardless of the results of subsequent urbanized area calculations.

*ii. Rationale for Using Urbanized Areas.* EPA is using urbanized areas to automatically designate regulated small MS4s on a nationwide basis for several reasons: (1) studies and data show a high correlation between degree of development/urbanization and adverse impacts on receiving waters due to storm water (U.S. EPA, 1983; Driver et al., 1985; Pitt, R.E. 1991. "Biological Effects of Urban Runoff Discharges." Presented at the Engineering Foundation Conference: *Urban Runoff and Receiving Systems; An Interdisciplinary Analysis of Impact, Monitoring and Management*, August 1991. Mt. Crested Butte, CO. American Society of Civil Engineers, New York. 1992.; Pitt, R.E. 1995. "Biological Effects of Urban Runoff Discharges," in *Storm water Runoff and Receiving Systems: Impact, Monitoring, and Assessment*. Lewis Publishers, New York.; Galli, J. 1990. *Thermal Impacts Associated with Urbanization and Storm water Management Best Management Practices*. Prepared for the Sediment and Storm water Administration of the Maryland Department of the Environment.; Klein, 1979), (2) the blanket coverage within the urbanized area encourages the watershed approach and addresses the problem of "donut-holes," where unregulated areas are surrounded by areas currently regulated (storm water discharges from donut hole areas present a problem due to their contributing uncontrolled adverse impacts on local waters, as well as by frustrating the attainment of water quality goals of neighboring regulated communities), (3) this approach targets present and future growth areas as a preventative measure to help ensure water quality protection, and (4) the determination of urbanized areas by the Bureau of the Census allows operators of small MS4s to quickly determine whether they are included in the NPDES storm water program as a regulated small MS4.

Urbanized areas have experienced significant growth over the past 50 years. According to EPA calculations [\*68752] based on Census data from 1980 to 1990, the national average rate of growth in the United States during that 10-year period was more than 4 percent. For the same period, the average growth within urbanized areas was 15.7 percent and the average for outside of urbanized areas was just more than 1 percent. The new development occurring in these growing areas can provide some of the best opportunities for implementing cost-effective storm water management controls.

EPA received many comments on the proposal to designate discharges based on location within urbanized areas. EPA considered numerous other approaches, several of which are discussed in the proposal to today's final rule. Several commenters wanted designation to be based on proven water quality problems rather than inclusion in an urbanized area. One commenter proposed an approach based on the CWA 303(d) listing of impaired waters and the wasteload allocation conducted under the TMDL process. (See section II.L. on the section 303(d) and TMDL process). The commenter's proposal would designate small MS4s on a case-by-case basis, covering only those discharges where receiving streams are shown to have water quality problems, particularly a failure to meet water quality standards, including designated uses. The commenter further described a non-NPDES approach where a State would require cost-effective measures based on a proportionate share under a waste load allocation, equitably allocated among all pollutant contributors. These waste load allocations would be developed with input from all stakeholders, and remedial measures would be implemented in a phased manner based on the probability of results and/or economic feasibility. The States would then periodically reassess the receiving streams to determine whether the remedial measures are working, and if not, require additional control measures using the same procedure used to establish the initial measures. What the commenter describes is almost a TMDL.

EPA considered a remedial approach based on water quality impairment and rejected it for failure to prevent almost certain degradation caused by urban storm water. EPA's main concern in opting not to take a case-by-case approach to designation was that this approach would not provide controls for storm water discharges in receiving streams until after a site-specific demonstration of adverse water quality impact. The commenter's suggestion would do nothing to prevent pollution in waters that may be meeting water quality standards, including supporting designated uses. The approach would also rely on identifying storm water management programs following comprehensive watershed plans and TMDL development. In most States, water quality assessments have traditionally been conducted for principal main-stream rivers and their major tributaries, not all surface waters. The establishment of TMDLs nationwide will take many

years, and many States will conduct additional monitoring to determine water quality conditions prior to establishing TMDLs. In addition, a case-by-case approach would not address the problem of "donut holes" within urbanized areas and a lack of consistency among similarly situated municipal systems would remain commonplace. After careful consideration of all comments, EPA still believes that the approach in today's rule is the most appropriate to protect water quality. Protection includes prevention as well as remediation.

#### d. Municipal Designation by the Permitting Authority

Today's final rule also allows NPDES permitting authorities to designate MS4s that should be included in the storm water program as regulated small MS4s but are not located within urbanized areas. The final rule requires, at a minimum, that a set of designation criteria be applied to all small MS4s within a jurisdiction that serves a population of at least 10,000 and has a population density of at least 1,000. Appendix 7 to this preamble provides an illustrative list of places that the Agency anticipates meet this criteria. In addition, any small MS4 may be the subject of a petition to the NPDES permitting authority for designation. See Section II.G, NPDES Permitting Authority's Role for more details on the designation and petition processes. EPA believes that the approach of combining nationwide and local designation to determine municipal coverage balances the potential for significant adverse impacts on water quality with local watershed protection and planning efforts.

#### e. Waiving the Requirements for Small MS4s

Today's final rule includes some flexibility in the nationwide coverage of all small MS4s located in urbanized areas by providing the NPDES permitting authority with the discretion to waive the otherwise applicable requirements of the smallest MS4s that are not causing the impairment of a receiving water body. Qualifications for the waiver vary depending on whether the MS4 serves a population under 1,000 or a population between 1,000 and 10,000. Note that even if a small MS4 has requirements waived, it can subsequently be brought back into the program if circumstances change. See Section II.G, NPDES Permitting Authority's Role, for more details on this process.

### 3. Municipal Permit Requirements

#### a. Overview

*i. Summary of Permitting Options.* Today's rule outlines six minimum control measures that constitute the framework for a storm water discharge control program for regulated small MS4s that, when properly implemented, will reduce pollutants to the maximum extent practicable (MEP). These six minimum control measures are specified in § 122.34(b) and are discussed below in section "II.H.3.b, Program Requirements-Minimum Control Measures." All operators of regulated small MS4s are required to obtain coverage under an NPDES permit, unless the requirement is waived by the permitting authority in accordance with today's rule. Implementation of § 122.34(b) may be required either through an individual permit or, if the State or EPA makes one available to the facility, through a general permit. The process for issuing and obtaining these permits is discussed below in section "II.H.3.c, Application Requirements."

As an alternative to implementing a program that complies with the requirements of § 122.34, today's rule provides operators of regulated small MS4s with the option of applying for an individual permit under § 122.26(d). The permit application requirements in § 122.26 were originally drafted to apply to medium and large MS4s. Although EPA believes that the requirements of § 122.34 provide a regulatory option that is appropriate for most small MS4s, the operators of some small MS4s may prefer more individualized requirements. This alternative permitting option for regulated small MS4s that wish to develop their own program is discussed below in section "II.H.3.c.iii. Alternative Permit Option." The second alternative permitting option for regulated small MS4s is to become co-permittees with a medium or large MS4 regulated under § 122.26(d), as discussed below in section "II.H.3.c.v. Joint Permit Programs."

*ii. Water Quality-Based Requirements.* Any NPDES permit issued under today's rule must, at a minimum, require the operator to develop, implement, and [\*68753] enforce a storm water management program designed to reduce the discharge of pollutants from a regulated system to the MEP, to protect water quality, and satisfy the appropriate water quality requirements of the Clean Water Act (see MEP discussion in the following section). Absent evidence to the contrary, EPA presumes that a small MS4 program that implements the six minimum measures in today's rule does not require more stringent limitations to meet water quality standards. Proper implementation of the measures will significantly improve water quality. As discussed further below, however, small MS4 permittees should modify their programs if and when available information indicates that water quality considerations warrant greater attention or prescriptiveness in specific components of the municipal program. If the program is inadequate to protect water quality,



including water quality standards, then the permit will need to be modified to include any more stringent limitations necessary to protect water quality.

Regardless of the basis for the development of the effluent limitations (whether designed to implement the six minimum measures or more stringent or prescriptive limitations to protect water quality), EPA considers narrative effluent limitations requiring implementation of BMPs to be the most appropriate form of effluent limitations for MS4s. CWA section 402(p)(3)(b)(iii) expresses a preference for narrative rather than numeric effluent limits, for example, by reference to "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). EPA determines that pollutants from wet weather discharges are most appropriately controlled through management measures rather than end-of-pipe numeric effluent limitations. As explained in the Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits, issued on August 1, 1996 [61 FR 43761 (November 26, 1996), EPA believes that the currently available methodology for derivation of numeric water quality-based effluent limitations is significantly complicated when applied to wet weather discharges from MS4s (compared to continuous or periodic batch discharges from most other types of discharge). Wet weather discharges from MS4s introduce a high degree of variability in the inputs to the models currently available for derivation of water quality based effluent limitations, including assumptions about instream and discharge flow rates, as well as effluent characterization. In addition, EPA anticipates that determining compliance with any such numeric limitations may be confounded by practical limitations in sample collection.

In the first two to three rounds of permit issuance, EPA envisions that a BMP-based storm water management program that implements the six minimum measures will be the extent of the NPDES permit requirements for the large majority of regulated small MS4s. Because the six measures represent a significant level of control if properly implemented, EPA anticipates that a permit for a regulated small MS4 operator implementing BMPs to satisfy the six minimum control measures will be sufficiently stringent to protect water quality, including water quality standards, so that additional, more stringent and/or more prescriptive water quality based effluent limitations will be unnecessary.

If a small MS4 operator implements the six minimum control measures in § 122.34(b) and the discharges are determined to cause or contribute to non-attainment of an applicable water quality standard, the operator needs to expand or better tailor its BMPs within the scope of the six minimum control measures. EPA envisions that this process will occur during the first two to three permit terms. After that period, EPA will revisit today's regulations for the municipal separate storm sewer program.

If the permitting authority (rather than the regulated small MS4 operator) needs to impose additional or more specific measures to protect water quality, then that action will most likely be the result of an assessment based on a TMDL or equivalent analysis that determines sources and allocations of pollutant(s) of concern. EPA believes that the small MS4's additional requirements, if any, should be guided by its equitable share based on a variety of considerations, such as cost effectiveness, proportionate contribution of pollutants, and ability to reasonably achieve wasteload reductions. Narrative effluent limitations in the form of BMPs may still be the best means of achieving those reductions.

See Section II.L, Water Quality Issues, for further discussion of this approach to permitting, consistent with EPA's interim permitting guidance. Pursuant to CWA section 510, States implementing their own NPDES programs may develop more stringent or more prescriptive requirements than those in today's rule.

EPA's interpretation of CWA section 402(p)(3)(B)(iii) was recently reviewed by the Ninth Circuit in *Defenders of Wildlife, et al v. Browner*, No. 98-71080 (September 15, 1999). The Court upheld the Agency's action in issuing five MS4 permits that included water quality-based effluent limitations. The Court did, however, disagree with EPA's interpretation of the relationship between CWA sections 301 and 402(p). The Court reasoned that MS4s are not compelled by section 301(b)(1)(C) to meet all State water quality standards, but rather that the Administrator or the State may rely on section 402(p)(3)(B)(iii) to require such controls. Accordingly, the *Defenders of Wildlife* decision is consistent with the Agency's 1996 "Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits."

As noted, the 1996 Policy describes how permits would implement an iterative process using BMPs, assessment, and refocused BMPs, leading toward attainment of water quality standards. The ultimate goal of the iteration would be for water bodies to support their designated uses. EPA believes this iterative approach is consistent with and implements section 301(b)(1)(C), notwithstanding the Ninth Circuit's interpretation. As an alternative to basing these water quality-based requirements on section 301(b)(1)(C), however, EPA also believes the iterative approach toward attainment of water quality standards represents a reasonable interpretation of CWA section 402(p)(3)(B)(iii). For this reason, today's rule specifies that the "compliance target" for the design and implementation of municipal storm water control programs

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is "to reduce pollutants to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA." The first component, reductions to the MEP, would be realized through implementation of the six minimum measures. The second component, to protect water quality, reflects the overall design objective for municipal programs based on CWA section 402(p)(6). The third component, to implement other applicable water quality requirements of the CWA, recognizes the Agency's specific determination under CWA section 402(p)(3)(B)(iii) of the need to achieve reasonable further progress toward attainment of water quality standards according to the iterative BMP process, as well as the determination that State or EPA officials who establish TMDLs could allocate waste loads to [\*68754] MS4s, as they would to other point sources.

EPA does not presume that water quality will be protected if a small MS4 elects not to implement all of the six minimum measures and instead applies for alternative permit limits under § 122.26(d). Operators of such small MS4s that apply for alternative permit limits under § 122.26(d) must supply additional information through individual permit applications so that the permit writer can determine whether the proposed program reduces pollutants to the MEP and whether any other provisions are appropriate to protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act.

iii. *Maximum Extent Practicable.* Maximum extent practicable (MEP) is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve. The CWA requires that NPDES permits for discharges from MS4s "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." CWA Section 402(p)(3)(B)(iii). This section also calls for "such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." EPA interprets this standard to apply to all MS4s, including both existing regulated (large and medium) MS4s, as well as the small MS4s regulated under today's rule.

For regulated small MS4s under today's rule, authorization to discharge may be under either a general permit or individual permit, but EPA anticipates and expects that general permits will be the most common permit mechanism. The general permit will explain the steps necessary to obtain permit authorization. Compliance with the conditions of the general permit and the series of steps associated with identification and implementation of the minimum control measures will satisfy the MEP standard. Implementation of the MEP standard under today's rule will typically require the permittee to develop and implement appropriate BMPs to satisfy each of the required six minimum control measures.

In issuing the general permit, the NPDES permitting authority will establish requirements for each of the minimum control measures. Permits typically will require small MS4 permittees to identify in their NOI the BMPs to be performed and to develop the measurable goals by which implementation of the BMPs can be assessed. Upon receipt of the NOI from a small MS4 operator, the NPDES permitting authority will have the opportunity to review the NOI to verify that the identified BMPs and measurable goals are consistent with the requirement to reduce pollutants under the MEP standard, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. If necessary, the NPDES permitting authority may ask the permittee to revise their mix of BMPs, for example, to better reflect the MEP pollution reduction requirement. Where the NPDES permit is not written to implement the minimum control measures specified under § 122.34(b), for example in the case of an individual permit under § 122.33(b)(2)(ii), the MEP standard will be applied based on the best professional judgment of the permit writer.

Commenters argued that MEP is, as yet, an undefined term and that EPA needs to further clarify the MEP standards by providing a regulatory definition that includes recognition of cost considerations and technical feasibility. Commenters argued that, without a definition, the regulatory community is not adequately on notice regarding the standard with which they need to comply. EPA disagrees that affected MS4 permittees will lack notice of the applicable standard. The framework for the small MS4 permits described in this notice provides EPA's interpretation of the standard and how it should be applied.

EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, specific local concerns, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance.

The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative

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process. Permit writers may evaluate small MS4 operator's proposed storm water management controls to determine whether reduction of pollutants to the MEP can be achieved with the identified BMPs.

EPA envisions application of the MEP standard as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. EPA envisions that this process may take two to three permit terms.

One commenter observed that MEP is not static and that if the six minimum control measures are not achieving the necessary water quality improvements, then an MS4 should be expected to revise and, if necessary, expand its program. This concept, it is argued, must be clearly part of the definition of MEP and thus incorporated into the binding and operative aspects of the rule. As is explained above, EPA believes that it is. The iterative process described above is intended to be sensitive to water quality concerns. EPA believes that today's rule contains provisions to implement an approach that is consistent with this comment.

#### b. Program Requirements' Minimum Control Measures

A regulated small MS4 operator must develop and implement a storm water management program designed to reduce the discharge of pollutants from their MS4 to protect water quality. The storm water management program must include the following six minimum measures.

*i. Public Education and Outreach on Storm Water Impacts.* Under today's final rule, operators of small MS4s must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps to reduce storm water pollution. The public education program should inform individuals and households about the problem and the steps they can take to reduce or prevent storm water pollution.

EPA believes that as the public gains a greater understanding of the storm water program, the MS4 is likely to gain [\*68755] more support for the program (including funding initiatives). In addition, compliance with the program will probably be greater if the public understands the personal responsibilities expected of them. Well-informed citizens can act as formal or informal educators to further disseminate information and gather support for the program, thus easing the burden on the municipalities to perform all educational activities.

MS4s are encouraged to enter into partnerships with their States in fulfilling the public education requirement. It may be more cost-effective to utilize a State education program instead of numerous MS4s developing their own programs. MS4 operators are also encouraged to work with other organizations (e.g., environmental, nonprofit and industry organizations) that might be able to assist in fulfilling this requirement.

The public education program should be tailored, using a mix of locally appropriate strategies, to target specific audiences and communities (particularly minority and disadvantaged communities). Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed and beach cleanups. Operators of MS4s may use storm water educational information provided by the State, Tribe, EPA, or environmental, public interest, trade organizations, or other MS4s. Examples of successful public education efforts concerning polluted runoff can be found in many State nonpoint source pollution control programs under CWA section 319.

The public education program should inform individuals and households about steps they can take to reduce storm water pollution, such as ensuring proper septic system maintenance, ensuring the use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes. Additionally, the program could inform individuals and groups on how to become involved in local stream and beach restoration activities as well as activities coordinated by youth service and conservation corps and other citizen groups. Finally, materials or outreach programs should be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. For example, MS4 operators should provide information to restaurants on the impact of grease clogging storm drains and to auto garages on the impacts of used oil discharges.

EPA received comments from representatives of State DOTs and U.S. Department of Defense (DOD) installations seeking exemption from the public education requirement. While today's rule does not exempt DOTs and military bases from the user education requirement, the Agency believes the flexibility inherent in the Rule addresses many of the concerns expressed by these commenters.

Certain DOT representatives commented that if their agencies were not exempt from the user education measure's requirements, they should at least be allowed to count DOT employee education as an adequate substitute. EPA supports the use of existing materials and programs, granted such materials and programs meet the rule's requirement that the MS4 user community (*i.e.*, the public) is also educated concerning the impacts of storm water discharges on water bodies and the steps to reduce storm water pollution.

Finally, certain DOD representatives requested that "public," as applied to their installations, be defined as the resident and employee populations within the fence line of the facility. EPA agrees that the education effort should be directed toward those individuals who frequent the federally owned land (*i.e.*, residents and individuals who come there to work and use the MS4 facilities).

EPA also received a number of comments from municipalities stating that education would be more thorough and cost effective if accomplished by EPA on the national level. EPA believes that a collaborative State and local approach, in conjunction with significant EPA technical support, will best meet the goal of targeting, and reaching, specific local audiences. EPA technical support will include a tool box which will contain fact sheets, guidance documents, an information clearinghouse, and training and outreach efforts.

Finally, EPA received comments expressing concern that the public education program simply encourages the distribution of printed material. EPA is sensitive to this concern. Upon evaluation, the Agency made changes to the proposal's language for today's rule. The language has been changed to reflect EPA's belief that a successful program is one that includes a variety of strategies locally designed to reach specific audiences.

*ii. Public Involvement/Participation.* Public involvement is an integral part of the small MS4 storm water program. Accordingly, today's final rule requires that the municipal storm water management program must comply with applicable State and local public notice requirements. Section 122.34(b)(2) recommends a public participation process with efforts to reach out and engage all economic and ethnic groups. EPA believes there are two important reasons why the public should be allowed and encouraged to provide valuable input and assistance to the MS4's program.

First, early and frequent public involvement can shorten implementation schedules and broaden public support for a program. Opportunities for members of the public to participate in program development and implementation could include serving as citizen representatives on a local storm water management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts. Moreover, members of the public may be less likely to raise legal challenges to a MS4's storm water program if they have been involved in the decision making process and program development and, therefore, internalize personal responsibility for the program themselves.

Second, public participation is likely to ensure a more successful storm water program by providing valuable expertise and a conduit to other programs and governments. This is particularly important if the MS4's storm water program is to be implemented on a watershed basis. Interested stakeholders may offer to volunteer in the implementation of all aspects of the program, thus conserving limited municipal resources.

EPA recognizes that there are a number of challenges associated with public involvement. One challenge is in engaging people in the public meeting and program design process. Another challenge is addressing conflicting viewpoints. Nevertheless, EPA strongly believes that these challenges can be addressed by use of an aggressive and inclusive program. Section II.K. provides further discussion on public involvement.

A number of municipalities sought clarification from EPA concerning what the public participation program must [\*68756] actually include. In response, the actual requirements are minimal, but the Agency's *recommendations* are more comprehensive. The public participation program must only comply with applicable State and local public notice requirements. The remainder of the preamble, as well as the Explanatory Note accompanying the regulatory text, provide guidance to the MS4s concerning what elements a successful and inclusive program should include. EPA will provide technical support as part of the tool box (*i.e.*, providing model public involvement programs, conducting public workshops, *etc.*) to assist MS4 operators meet the intent of this measure.

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Finally, the Agency encourages MS4s to seek public participation prior to submitting an NOI. For example, public participation at this stage will allow the MS4 to involve the public in developing the BMPs and measurable goals for their NOI.

*iii. Illicit Discharge Detection and Elimination.* Discharges from small MS4s often include wastes and wastewater from non-storm water "illicit" discharges. Illicit discharge is defined at *40 CFR 122.26(b)(2)* as any discharge to a municipal separate storm sewer that is not composed entirely of storm water, except discharges pursuant to an NPDES permit and discharges resulting from fire fighting activities. As detailed below, other sources of non-storm water, that would otherwise be considered illicit discharges, do not need to be addressed unless the operator of the MS4 identifies one or more of them as a significant source of pollutants into the system. EPA's Nationwide Urban Runoff Program (NURP) indicated that many storm water outfalls still discharge during substantial dry periods. Pollutant levels in these dry weather flows were shown to be high enough to significantly degrade receiving water quality. Results from a 1987 study conducted in Sacramento, California, revealed that slightly less than one-half of the water discharged from a municipal separate storm sewer system was not directly attributable to precipitation runoff (U.S. Environmental Protection Agency, Office of Research and Development. 1993. *Investigation of Inappropriate Pollutant Entries Into Storm Drainage Systems-A User's Guide*. Washington, DC EPA 600/R-92/238.) A significant portion of these dry weather flows results from illicit and/or inappropriate discharges and connections to the municipal separate storm sewer system. Illicit discharges enter the system through either direct connections (e.g., wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (e.g., infiltration into the storm drain system or spills collected by drain inlets).

Under the existing NPDES program for storm water, permit applications for large and medium MS4s are to include a program description for effective prohibition against non-storm water discharges into their storm sewers (see *40 CFR 122.26 (d)(1)(v)(B)* and *(d)(1)(iv)(B)*). Further, EPA believes that in implementing municipal storm water management plans under these permits, large and medium MS4 operators generally found their illicit discharge detection and elimination programs to be cost-effective. Properly implemented programs also significantly improved water quality.

In today's rule, any NPDES permit issued to an operator of a regulated small MS4 must, at a minimum, require the operator to develop, implement and enforce an illicit discharge detection and elimination program. Inclusion of this measure for regulated small MS4s is consistent with the "effective prohibition" requirement for large and medium MS4s. Under today's rule, the NPDES permit will require the operator of a regulated small MS4 to: (1) Develop (if not already completed) a storm sewer system map showing the location of all outfalls, and names and location of all waters of the United States that receive discharges from those outfalls; (2) to the extent allowable under State, Tribal, or local law, effectively prohibit through ordinance, or other regulatory mechanism, illicit discharges into the separate storm sewer system and implement appropriate enforcement procedures and actions as needed; (3) develop and implement a plan to detect and address illicit discharges, including illegal dumping, to the system; and (4) inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.

The illicit discharge and elimination program need only address the following categories of non-storm water discharges if the operator of the small MS4 identifies them as significant contributors of pollutants to its small MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at *40 CFR 35.2005(20)*), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from fire fighting activities are excluded from the definition of illicit discharge and only need to be addressed where they are identified as significant sources of pollutants to waters of the United States). If the operator of the MS4 identifies one or more of these categories of sources to be a significant contributor of pollutants to the system, it could require specific controls for that category of discharge or prohibit the discharges completely.

Several comments were received on the mapping requirements of the proposal. Most comments said that more flexibility should be given to the MS4s to determine their mapping needs, and that resources could be better spent in addressing problems once the illicit discharges are detected. EPA reviewed the mapping requirements in the proposed rule and agrees that some of the information is not necessary in order to begin an illicit discharge detection and elimination program. Today's rule requires a map or set of maps that show the locations of all outfalls and names and locations of receiving waters. Knowing the locations of outfalls and receiving waters are necessary to be able to conduct dry weather field screening for non-storm water flows and to respond to illicit discharge reports from the public. EPA recommends that the operator collect any existing information on outfall locations (e.g., review city records, drainage

maps, storm drain maps), and then conduct field surveys to verify the locations. It will probably be necessary to "walk" (*i.e.* wade small receiving waters or use a boat for larger receiving waters) the streambanks and shorelines, and it may take more than one trip to locate all outfalls. A coding system should be used to mark and identify each outfall. MS4 operators have the flexibility to determine the type (*e.g.* topographic, GIS, hand or computer drafted) and size of maps which best meet their needs. The map scale should be such that the outfalls can be accurately located. Once an illicit discharge is detected at an outfall, it may be necessary to map that portion of the storm sewer system leading to the outfall in order to locate the source of the discharge.

Several comments requested clarification of the requirement to develop and implement a plan to detect and eliminate illicit discharges. EPA recommends that plans include procedures for the following: locating priority areas; tracing the source of an illicit discharge; removing the source of the discharge; and program evaluation [\*68757] and assessment. EPA recommends that MS4 operators identify priority areas (*i.e.*, problem areas) for more detailed screening of their system based on higher likelihood of illicit connections (*e.g.*, areas with older sanitary sewer lines), or by conducting ambient sampling to locate impacted reaches. Once priority areas are identified, EPA recommends visually screening outfalls during dry weather and conducting field tests, where flow is occurring, of selected chemical parameters as indicators of the discharge source. EPA's manual for investigation of inappropriate pollutant entries into the storm drainage system (EPA, 1993) suggests the following parameter list: specific conductivity, fluoride and/or hardness concentration, ammonia and/or potassium concentration, surfactant and/or fluorescence concentration, chlorine concentration, pH and other chemicals indicative of industrial sources. The manual explains why each parameter is a good indicator and how the information can be used to determine the type of source flow. The Agency is not recommending that fluoride and chlorine, generally used to locate potable water discharges, be addressed under this program, therefore a short list of parameters may include conductivity, ammonia, surfactant and pH. Some MS4s have found it useful to measure for fecal coliform or *E. coli* in their testing program. Observations of physical characteristics of the discharge are also helpful such as flow rate, temperature, odor, color, turbidity, floatable matter, deposits and stains, and vegetation.

The implementation plan should also include procedures for tracing the source of an illicit discharge. Once an illicit discharge is detected and field tests provide source characteristics, the next step is to determine the actual location of the source. Techniques for tracing the discharge to its place of origin may include: following the flow up the storm drainage system via observations and/or chemical testing in manholes or in open channels; televising storm sewers; using infrared and thermal photography; conducting smoke or dye tests.

The implementation plan should also include procedures for removing the source of the illicit discharge. The first step may be to notify the property owner and specify a length of time for eliminating the discharge. Additional notifications and escalating legal actions should also be described in this part of the plan.

Finally, the implementation plan should include procedures for program evaluation and assessment. Procedures could include documentation of actions taken to locate and eliminate illicit discharges such as: number of outfalls screened, complaints received and corrected, feet of storm sewers televised, numbers of discharges and quantities of flow eliminated, number of dye or smoke tests conducted. Appropriate records of such actions should be kept and should be submitted as part of the annual reports for the first permit term, as specified by the permitting authority (reports only need to be submitted in years 2 and 4 in later permits). For more on reporting requirements, see § 122.34(g).

EPA received comments regarding an MS4's legal authority beyond its jurisdictional boundaries to inspect or take enforcement against illicit discharges. EPA recognizes that illicit flows may originate in one jurisdiction and cross into one or more jurisdictions before being discharged at an outfall. In such instances, EPA expects the MS4 that detects the illicit flow to trace it to the point where it leaves their jurisdiction and notify the adjoining MS4 of the flow, and any other physical or chemical information. The adjoining MS4 should then trace it to the source or to the location where it enters their jurisdiction. The process of notifying the adjoining MS4 should continue until the source is located and eliminated. In addition, because any non-storm water discharge to waters of the U.S. through an MS4 is subject to the prohibition against unpermitted discharges pursuant to CWA section 301 (a), remedies are available under the federal enforcement provisions of CWA sections 309 and 505.

EPA requested and received comments regarding the prohibition and enforcement provision for this minimum measure. Commenters specifically questioned the proposal that the operator only has to implement the appropriate prohibition and enforcement procedures "to the extent allowable under State or Tribal law." They raised concerns that by qualifying prohibition and enforcement procedures in this manner, the operator could altogether ignore this minimum measure where affirmative legal authority did not exist. Comments suggested that EPA require States to grant authority

to those municipalities where it did not exist. Other comments, however, stated that municipalities cannot exercise legal authority not granted to them under State law, which varies considerably from one State to another. EPA has no intention of directing State legislatures on how to allocate authority and responsibility under State law. As noted above, there is at least one remedy (the federal CWA) to control non-storm water discharges through MS4s. If State law prevents political subdivisions from controlling discharges through storm sewers, EPA anticipates common sense will prevail to provide those MS4 operators with the ability to meet the requirements applicable for their discharges.

One comment reinforced the importance of public information and education to the success of this measure. EPA agrees and suggests that MS4 operators consider a variety of ways to inform and educate the public which could include storm drain stenciling; a program to promote, publicize, and facilitate public reporting of illicit connections or discharges; and distribution of visual and/or printed outreach materials. Recycling and other public outreach programs could be developed to address potential sources of illicit discharges, including used motor oil, antifreeze, pesticides, herbicides, and fertilizers.

EPA received comments that State DOT's lack authority to implement this measure. EPA believes that most DOTs can implement most parts of this measure. If a DOT does not have the necessary legal authority to implement any part of this measure, EPA encourages them to coordinate their storm water management efforts with the surrounding MS4s and other State agencies. Many DOTs that are regulated under Phase I of this program are co-permittees with the local regulated MS4. Under today's rule, DOTs can use any of the options of § 122.35 to share their storm water management responsibilities.

EPA received comments requesting clarification of various terms such as "outfall" and "illicit discharge." One comment asked EPA to reinforce the point that a "ditch" could be considered an outfall. The term "outfall" is defined at 40 CFR 122.26(b)(9) as "a point source at the point where a municipal separate storm sewer discharges to waters of the United States \* \* \*". The term municipal separate storm sewer is defined at 40 CFR § 122.26(b)(8) as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) \* \* \*". Following the logic of these definitions, a "ditch" may be part of the municipal separate storm sewer, and at the point where the ditch discharges to waters of the United States, it would be an outfall. As with any determination about jurisdictional provisions of the CWA, however, final decisions require case specific evaluations of fact. [\*68758]

One commenter specifically requested clarification on the relationship between the term "illicit discharge" and non-storm water discharges from fire fighting. The comment suggested that it would be impractical to attempt to determine whether the flow from a specific fire (*i.e.*, during a fire) is a significant source of pollution. EPA intends that MS4s will address all allowable non-storm water flows categorically rather than individually. If an MS4 is concerned that flows from fire fighting are, as a category, contributing substantial amounts of pollutants to their system, they could develop a program to address those flows prospectively. The program may include an analysis of the flow from several sources, steps to minimize the pollutant contribution, and a plan to work with the sources of the discharge to minimize any adverse impact on water quality. During the development of such a program, the MS4 may determine that only certain types of flows within a particular category are a concern, for example, fire fighting flows at industrial sites where large quantities of chemicals are present. In this example, a review of existing procedures with the fire department and/or hazardous materials team may reveal weaknesses or strengths previously unknown to the MS4 operator.

EPA received comments requesting modifications to the rule to include on-site sewage disposal systems (*i.e.*, septic systems) in the scope of the illicit discharge program. On-site sewage disposal systems that flow into storm drainage systems are within the definition of illicit discharge as defined by the regulations. Where they are found to be the source of an illicit discharge, they need to be eliminated similar to any other illicit discharge source. Today's rule was not modified to include discharges from on-site sewage disposal systems specifically because those sources are already within the scope of the existing definition of illicit discharge.

*iv. Construction Site Storm Water Runoff Control.* Over a short period of time, storm water runoff from construction site activity can contribute more pollutants, including sediment, to a receiving stream than had been deposited over several decades (see section I.B.3). Storm water runoff from construction sites can include pollutants other than sediment, such as phosphorus and nitrogen, pesticides, petroleum derivatives, construction chemicals, and solid wastes that may become mobilized when land surfaces are disturbed. Generally, properly implemented and enforced construction site ordinances effectively reduce these pollutants. In many areas, however, the effectiveness of ordinances in reducing pollutants is limited due to inadequate enforcement or incomplete compliance with such local ordinances by construc-

tion site operators (Paterson, R.G. 1994. "Construction Practices: The Good, the Bad, and the Ugly." *Watershed Protection Techniques* 1(2)).

Today's rule requires operators of regulated small MS4s to develop, implement, and enforce a pollutant control program to reduce pollutants in any storm water runoff from construction activities that result in land disturbance of 1 or more acres (see § 122.34(b)(4)). Construction activity on sites disturbing less than one acre must be included in the program if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more.

The construction runoff control program of the regulated small MS4 must include an ordinance or other regulatory mechanism to require erosion and sediment controls to the extent practicable and allowable under State, Tribal or local law. The program also must include sanctions to ensure compliance (for example, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance). The program must also include, at a minimum: requirements for construction site operators to implement appropriate erosion and sediment control BMPs, such as silt fences, temporary detention ponds and diversions; procedures for site plan review by the small MS4 which incorporate consideration of potential water quality impacts; requirements to control other waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may adversely impact water quality; procedures for receipt and consideration of information submitted by the public to the MS4; and procedures for site inspection and enforcement of control measures by the small MS4.

Today's rule provides flexibility for regulated small MS4s by allowing them to exclude from their construction pollutant control program runoff from those construction sites for which the NPDES permitting authority has waived NPDES storm water small construction permit requirements. For example, if the NPDES permitting authority waives permit coverage for storm water discharges from construction sites less than 5 acres in areas where the rainfall erosivity factor is less than 5, then the regulated small MS4 does not have to include these sites in its storm water management program. Even if requirements for a discharge from a given construction site are waived by the NPDES permitting authority, however, the regulated small MS4 may still choose to control those discharges under the MS4's construction pollutant control program, particularly where such discharges may cause siltation problems in storm sewers. See Section III.1.b for more information on construction waivers by the permitting authority.

Some commenters suggested that the proposed construction minimum measure requirements went beyond the permit application requirements concerning construction for medium and large MS4s. In response, EPA has made changes to the proposed measure so that it more closely resembles the MS4 permit application requirements in existing regulations. For example, as described below, the Agency revised the proposed requirements for "pre-construction review of site management plans" to require "procedures for site plan review."

One commenter expressed concerns that addressing runoff from construction sites within urbanized areas (through the small MS4 program) differently from construction sites outside urbanized areas (which will not be covered by the small MS4 program) will encourage urban sprawl. Today's rule, together with the existing requirements, requires all construction greater than or equal to 1 acre, unless waived, to be covered by an NPDES permit whether it is located inside or outside of an urbanized area (see § 122.26(b)(15)). Today's rule does not require small MS4s to control runoff from construction sites more stringently or prescriptively than is required for construction site runoff outside urbanized areas. Therefore, today's rule imposes no substantively different onsite controls on runoff of storm water from construction sites in urbanized areas than from construction sites outside of urbanized areas.

One commenter recommended that the small MS4 construction site storm water runoff control program address all storm water runoff from construction sites, not just the runoff into the MS4. The commenter also believed that MS4s should provide clear, objective standards for all construction sites. EPA agrees. Because today's rule only regulates discharges from the MS4, the construction pollutant control measure only requires small MS4 operators to control runoff into its system. As a practical matter, however, EPA anticipates that MS4 operators will find that regulation of all construction site [\*68759] runoff, whether they runoff into the MS4 or not, will prove to be the most simple and efficient program. The Agency may provide more specific criteria for construction site BMPs in the forthcoming rule being developed under CWA section 402(m). See section II.D.1 of today's rule.

One commenter stated that there is no need for penalties at the local level by the small MS4 because the CWA already imposes sufficient penalties to ensure compliance. EPA disagrees and believes that enforcement and compliance at the local level is both necessary and preferable. Examples of sanctions, some not available under the CWA, include non-monetary penalties, monetary fines, bonding requirements, and denial of future or other local permits.



One commenter recommended that EPA should not include the requirement to control pollutants other than sediment from construction sites in this measure. EPA disagrees with this comment. The requirement is to control waste that "may cause adverse impacts on water quality." Such wastes may include discarded building materials, concrete truck washout, chemicals, pesticides, herbicides, litter, and sanitary waste. These wastes, when exposed to and mobilized by storm water, can contribute to water quality impairment.

The proposed rule required "procedures for pre-construction review of site management plans." EPA requested comment on expanding this provision to require both review and approval of construction site storm water plans. Many commenters expressed the concern that review and approval of site plans is not only costly and time intensive, but may unnecessarily delay construction projects and unduly burden staff who administer the local program. In addition, some commenters expressed confusion whether EPA proposed pre-construction review for all site management plans or only higher priority sites. To address these comments, and be consistent with the permit application requirements for larger MS4s, EPA changed "procedures for pre-construction review of site management plans" to "procedures for site plan review." Today's rule requires the small MS4 to develop procedures for site plan review so as to incorporate consideration of adverse potential water quality impacts. Procedures should include review of site erosion and sediment control plans, preferably before construction activity begins on a site. The objective is for the small MS4 operator and the construction site operator to address storm water runoff from construction activity early in the project design process so that potential consequences to the aquatic environment can be assessed and adverse water quality impacts can be minimized or eliminated.

One commenter requested that EPA delete the requirement for "procedures for receipt and consideration of information submitted by the public" because it went beyond existing storm water requirements. Another commenter stated that establishing a separate process to respond to public inquiries on a project is a burden to small communities, especially if the project has gone through an environmental review. One commenter requested clarification of this provision. EPA has retained this requirement in today's final rule to require some formality in the process for addressing public inquiries regarding storm water runoff from construction activities. EPA does not intend that small MS4s develop a separate, burdensome process to respond to every public inquiry. A small MS4 could, for example, simply log public complaints on existing storm water runoff problems from construction sites and pass that information on to local inspectors. The inspectors could then investigate complaints based on the severity of the violation and/or priority area.

One commenter believed that the proposed requirement of "regular inspections during construction" would require every construction project to be inspected more than once by the small MS4 during the term of a construction project. EPA has deleted the reference to "regular inspections." Instead, the small MS4 will be required to "develop procedures for site inspection and enforcement of control measures." Procedures could include steps to identify priority sites for inspection and enforcement based on the nature and extent of the construction activity, topography, and the characteristics of soils and receiving water quality.

In order to avoid duplication of small MS4 construction requirements with NPDES construction permit requirements, today's rule adds § 122.44(s) to recognize that the NPDES permitting authority can incorporate qualifying State, Tribal, or local erosion and sediment control requirements in NPDES permits for construction site discharges. For example, a construction site operator who complies with MS4 construction pollutant control programs that are referenced in the NPDES construction permit would satisfy the requirements of the NPDES permit. See section II.I.1.d for more information on incorporating qualifying programs by reference into NPDES construction permits. This provision has no impact on, or direct relation to, the small MS4 operator's responsibilities under the construction site storm water runoff control minimum measure. Conversely, under § 122.35(b), the permitting authority may recognize in the MS4's permit that another governmental entity, or the permitting authority itself, is responsible for implementing one or more of the minimum measures (including construction site storm water runoff control), and not include this measure in the small MS4's permit. In this case, the other governmental entity's program must satisfy all of the requirements of the omitted measure.

*v. Post-Construction Storm Water Management in New Development and Redevelopment.* The NURP study and more recent investigations indicate that prior planning and designing for the minimization of pollutants in storm water discharges is the most cost-effective approach to storm water quality management. Reducing pollutant concentrations in storm water after the discharge enters a storm sewer system is often more expensive and less efficient than preventing or reducing pollutants at the source. Increased human activity associated with development often results in increased pollutant loading from storm water discharges. If potential adverse water quality impacts are considered from the beginning stages of a project, new development and redevelopment provides more opportunities for water quality protection. For example, minimization of impervious areas, maintenance or restoration of natural infiltration, wetland protection, use of



# Exhibit 15



FEDERAL REGISTER

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Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY (EPA)

40 CFR Parts 9, 122, 123, 124, and 130

[WH-FRL-7470-2]

RIN 2040-AD84

**Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation**

Part VI

68 FR 13608

**DATE:** Wednesday, March 19, 2003

**ACTION:** Final rule.

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[\*13608]

**SUMMARY:** Today's action withdraws the final rule entitled "Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation ("the July 2000 rule") published in the **Federal Register** on July 13, 2000. The July 2000 rule amended and clarified existing regulations implementing a section of the Clean Water Act (CWA) that requires States to identify waters that are not meeting applicable water quality standards and to establish pollutant budgets, called Total Maximum Daily Loads (TMDLs), to restore the quality of those waters. The July 2000 rule also amended EPA's National Pollutant Discharge Elimination System ("NPDES") regulations to include provisions addressing implementation of TMDLs through NPDES permits. The July 2000 rule has never become effective; it is currently scheduled to take effect on April 30, 2003. Today, EPA is withdrawing the July 2000 rule, rather than allow it to go into effect, because EPA believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an efficient and effective TMDL program. Furthermore, EPA needs additional time beyond April 30, 2003, to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA. The withdrawal of the July 2000 rule will not impede ongoing implementation of the existing TMDL program. Regulations that EPA promulgated in 1985 and amended in 1992 remain in effect for the TMDL program. EPA has been working steadily to identify regulatory and nonregulatory options to improve the TMDL program and is reviewing its ongoing implementation of the

existing program with a view toward continuous improvement and possible regulatory changes in light of stakeholder input and recommendations.

**DATES:** The July 2000 rule amending 40 CFR parts 9, 122, 123, 124 and 130, published on July 13, 2000, at 65 *FR* 43586, is withdrawn as of April 18, 2003. This rule is considered final for purposes of judicial review as of 1 p.m. eastern time, on April 2, 2003, as provided in 40 CFR 23.2.

**ADDRESSES:** The complete record for the final rule, Docket ID No. OW-2002-0037, is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B-102, 1301 Constitution Ave., NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** For information about today's final rule, contact: Francoise M. Brasier, U.S. EPA Office of Wetlands, Oceans and Watersheds (4503T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, phone (202) 566-2385.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Authority**

Clean Water Act sections 106, 205(g), 205(j), 208, 301, 302, 303, 305, 308, 319, 402, 501, 502, and 603; 33 *U.S.C.* 1256, 1285(g), 1285(j), 1288, 1311, 1312, 1313, 1315, 1318, 1329, 1342, 1361, 1362, and 1373.

##### **B. Entities Potentially Regulated by the Final Rule**

###### Table of Potentially Regulated Entities

Category	Examples of potentially regulated entities
Governments	States, Territories and Tribes with CWA responsibilities

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether you may be regulated by this action, you should carefully examine the applicability criteria in § 130.20 of title 40 of the Code of Federal Regulations. If you have any questions regarding the applicability of this action to you, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

##### **C. How Can I Get Copies of This Document and Other Related Information**

EPA has established an official public docket for this action under Docket ID No. OW-2002-0037. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, EPA West, Room B-102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426. For access to docket materials, please call ahead to schedule an appointment. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket> to view public comments, access the index listing of the contents of the official public docket and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility previously mentioned. Once in the electronic system, select "search" and then key in the appropriate docket identification number.

##### **D. Explanation of Today's Action**

###### *I. Background*

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On December 27, 2002, EPA proposed to withdraw final regulations affecting the TMDL program (67 FR 79020) that were published in the **Federal Register** on July 13, 2000 (65 FR 43586). Among other things, the July 2000 rule was intended to resolve issues concerning the identification of impaired waterbodies by promoting more comprehensive inventories of impaired waters. The rule was also intended to improve implementation of TMDLs by requiring EPA to approve, as part of the TMDL, implementation plans containing lists of actions and expeditious schedules to reduce pollutant loadings. Finally, the rule included changes to the NPDES program to assist in implementing TMDLs and to better address point source discharges to waters not meeting water quality standards prior to establishment of a TMDL. [\*13609]

The July 2000 rule was controversial from the outset. Both the proposed and final rules generated considerable controversy, as expressed in Congressional action, letters, testimony and public meetings. Even before it was published in the **Federal Register** on July 13, 2000, Congress prohibited EPA from implementing the final rule through a spending prohibition attached to an FY2000 appropriations bill that prohibited EPA from using funds "to make a final determination on or implement" the July 2000 rule. This spending prohibition was scheduled to expire on September 30, 2001, and, barring further action by Congress or EPA, the rule would have gone into effect 30 days later on October 30, 2001. Because of the continuing controversy regarding the July 2000 rule, EPA proposed on August 9, 2001 (66 FR 41817), and promulgated on October 18, 2001 (66 FR 53044), a new effective date of April 30, 2003, for the July 2000 rule, to allow time for reconsideration of the rule.

Stakeholder concerns were also reflected in legal challenges to the July 2000 rule by a broad array of litigants. Ten petitions for review were filed by States, industrial and agricultural groups, and environmental organizations asserting that many of EPA's revisions to the TMDL regulations were either unlawful under the Administrative Procedure Act or exceeded the Agency's authority under the CWA. These petitions, which identified more than 50 alleged legal defects in the July 2000 rule, were ultimately consolidated in *American Farm Bureau Federation et al. v. Whitman* (No. 00-1320) in the United States Court of Appeals for the District of Columbia Circuit. In addition, several other stakeholders have intervened in these lawsuits. The litigation over the July 2000 rule is currently stayed pending EPA's determination regarding whether, and to what extent, that rule should be revised.

In the December 27, 2002, preamble to the proposed withdrawal rule, EPA explained why it had decided to withdraw the July 2000 rule. EPA said that by continuing to examine the regulatory needs of the TMDL and NPDES programs against the impending April 30, 2003, effective date for the July 2000 rule, the Agency was sending confusing signals to the States and other interested parties about which set of rules they should be prepared to implement. Further, because of the significant controversy, pending litigation and lack of stakeholder consensus on key aspects of the July 2000 rule, the Agency said that the July 2000 rule could not function as the blueprint for an efficient and effective TMDL program without significant revisions. Moreover, the Agency said it needed more time to consider whether and how to revise the currently-effective TMDL rules without concern that those efforts would be adversely affected and distracted by the July 2000 rule's impending effective date. In the preamble to the proposed rule, the Agency also explained why it believes that, given the significant progress States have made during the past four years in developing TMDLs, withdrawal of the July 2000 rule will not compromise continuing efforts to implement section 303(d) of the Clean Water Act. EPA's rationale for proposing the withdrawal of the July 2000 rule is more fully explained in the preamble accompanying the proposal (67 FR 79020).

## II. Response to Comments and Final Decisions

EPA received approximately 90 separate written comments regarding its proposal to withdraw the July 2000 rule. These comments came from a broad cross-section of stakeholders, including agricultural and forestry groups, business and industry entities and trade associations, State agencies, environmental organizations, professional associations, academic groups and private citizens. An overwhelming majority of the commenters (more than 90 percent) supported EPA's proposed action to withdraw the July 2000 rule. These commenters generally agreed with the Agency's rationale for withdrawing the rule as discussed in the December 27, 2002, preamble. Commenters reiterated EPA's concerns about the potential distraction and confusion caused by the July 2000 rule's impending deadline, as well as the controversy surrounding various provisions of the rule and uncertainty caused by the pending DC Circuit Court litigation. Others stated that the July 2000 rule was no longer needed because of the increased technical guidance that EPA has provided to States to improve the quality of their lists of impaired waters, and the increased funding provided by EPA for developing TMDLs. Many commenters said that States have made significant strides in developing TMDLs since the rule was originally proposed and promulgated and, therefore, the July 2000 rule was not needed. Several commenters stated that allowing the July 2000 rule to go into effect would be disruptive to ongoing TMDL development efforts,

and that withdrawing the July 2000 rule would give the Agency additional time to evaluate the need for new TMDL regulations. Some commenters offered additional reasons for supporting withdrawal of the July 2000 rule. Although most of these reasons are consistent with EPA's rationale for withdrawing the July 2000 rule, some are not. For example, some commenters, though supporting EPA's decision to withdraw the July 2000 rule, also questioned the legal soundness of certain provisions of that rule. EPA does not necessarily agree with those comments, and its decision to-day to withdraw the July 2000 rule should not be understood as an implicit endorsement of those views and comments.

A small minority of commenters (four) disagreed with EPA's proposal to withdraw the July 2000 rule. One commenter asserted that withdrawing the July 2000 rule would "postpone the TMDL program for several more years" and, by removing incentives to reduce pollution, would hinder progress "to implement the TMDL program" and "only make the problem worse." Another commenter said that not going forward with the July 2000 rule would "undermine the momentum of State programs" that have been "waiting to see Federal guidelines to develop programs of their own." EPA does not agree with these comments. Indeed, one State in its comments supporting withdrawal said that the July 2000 rule "would undo much of the momentum and success" of the State's ongoing and successful TMDL program. As described in more detail in the December 27, 2002, preamble, in recent years, EPA and the States have made great strides in implementing the existing 303(d) program to list impaired waters and develop and implement TMDLs to restore impaired waters. States have substantially improved their TMDL programs while the Agency has provided the States with significant increases in technical and financial support to expand and strengthen all elements of their programs. From FY 1999 to 2002, EPA has provided the States almost \$ 30 million for TMDL-specific activities and allowed States to use a portion of State grants for water program administration (CWA section 106 grants) and nonpoint source programs (CWA sections 319 grants) for developing and implementing TMDLs. In addition, since 1998, EPA has spent more than \$ 11 million to support development of technical guidance for developing TMDLs and identifying the most appropriate and efficient best management practices for nonpoint [\*13610] sources. A complete list of these guidance documents can be found at: <http://www.epa.gov/edocket>.

Helped by these programmatic initiatives, States have made considerable progress in developing TMDLs despite the fact that the July 2000 rule never became effective. As stated in the December 27, 2002, proposal, between 1996 and 1999, EPA and the States established approximately 800 TMDLs. Since then, and despite the fact that the July 2000 rule never became effective, EPA and the States have established more than an additional 7,000 TMDLs; and States continue to improve the pace at which TMDLs are established. Given this progress and the States' adoption since 1998 of schedules for TMDL development, EPA anticipates no reduction in the pace of TMDLs being developed and the associated improvement in water quality, even if the July 2000 rule does not take effect.

One commenter objected to withdrawing the July 2000 rule because of provisions contained in the rule for expanded public involvement in the listing and TMDL development process. By not implementing the July 2000 rule, the commenter asserted that the public remains "shut out" of the listing and TMDL development process, which allows the States to develop impaired waters lists and establish TMDLs "without adequate public scrutiny." EPA disagrees with this comment. While it is true that the July 2000 rule would have clarified, and, in some measure strengthened, the public participation components of EPA's currently-effective TMDL regulations, the current statutory and regulatory provisions (as supplemented by EPA guidance to the States and its Regional Offices) already allow for public scrutiny and participation in the listing and TMDL development process. EPA's existing regulations require that the process for involving the public in a State's listing and TMDL program "shall be clearly described in the State Continuing Planning Process (CPP)" (40 CFR 130.7(a)), and § 130.7(c)(1)(ii) requires that a State's calculations to establish TMDLs be subject to public review, as defined in the State CPP. Additionally, EPA regulations require that when EPA disapproves and establishes a list or a TMDL, EPA must seek public comment (40 CFR 130.7(d)).

EPA's policy has always been that there should be full and meaningful public participation in both the listing and TMDL development process, and EPA has issued guidance in addition to the regulations to support this effort. In EPA's "Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992" (May 20, 2002), EPA states that, in addition to the TMDL regulatory requirements, "final TMDLs submitted to EPA for review and approval should describe the State's/tribe's public participation process, including a summary of significant comments and the State's/tribe's responses to those comments." The guidance also states that "provision of inadequate public participation may be a basis for disapproving a TMDL. If EPA determines that a State/tribe has not provided adequate public participation, EPA may defer its approval action until adequate public participation has been provided for, either by the State/tribe or by EPA."

EPA's "Integrated Report" guidance to States, tribes and EPA Regions (Integrated Water Quality Monitoring and Assessment Report (November 19, 2001)) states that "States and territories should provide for full public participation

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in the development of their Integrated Report prior to its submission to EPA. EPA believes that public understanding of how standard attainment determinations are made for all A[ssessment] U[nits]s is crucial to the success of water quality programs and encourages active stakeholder participation in the assessment and listing process... EPA will consider how the State or territory addressed the comments...when approving or disapproving the 303(d) list of AUs (Category 5)."

Most recently, in May 2002, EPA issued guidance to its Regional Offices stating that when reviewing State 303(d) lists, EPA Regions should review how States provided for public participation to ensure that each State carried out its public participation process consistent with the State's public participation requirements ("Recommended Framework for EPA Approval Decisions on 2002 State Section 303(d) List Submission.") If the Region believes a State has not provided adequate public participation, the guidance provides steps the Region should take in working with a State to provide for additional public participation, and how the State or, if necessary, the Region, should consider and address public comments prior to EPA's approval or disapproval of the list. Finally, it is important to note that nearly all of the States already have public participation requirements under their own State laws for the listing and TMDL development processes, and also provide for public notice.

For all of these reasons, EPA believes that adequate public participation opportunities exist under the currently-effective regulations and that withdrawing the July 2000 rule will not limit meaningful public participation in the listing and TMDL development process.

One commenter stated that, by not implementing the July 2000 rule, States would continue to have inadequate monitoring programs and continue to develop lists of impaired waters based on inadequate data. EPA disagrees. EPA recognizes that no State has a perfect monitoring and listing program. Monitoring and assessment programs are expensive to assemble and implement. While the July 2000 rule would have clarified certain aspects of the existing TMDL regulations regarding listing methodologies, that rule, by itself, would not have provided the additional funding needed by many States to expand their monitoring and assessment programs. Moreover, many of the important listing clarifications and improvements contained in the July 2000 rule have already been provided to, and are currently being implemented by, States, even without the July 2000 rule having gone into effect.

To assist in implementation of the currently-effective TMDL rules, EPA issued the "2002 Integrated Water Quality Monitoring and Assessment Report Guidance" (November 19, 2001) to promote a more integrated and comprehensive system of accounting for the nation's impaired waters. The guidance recommends that States submit an "Integrated Report" that will satisfy CWA requirements for both section 305(b) water quality reports and section 303(d) lists. The objectives of this guidance are to strengthen State monitoring programs, encourage timely monitoring to support decision making, increase numbers of waters monitored, and provide a full accounting of all waters and uses. The guidance encourages a rotating basin approach and strengthened State assessment methodologies, and is intended to improve public confidence in water quality assessments and 303(d) lists. EPA extended the date for submission of 2002 lists by six months (*66 FR 53044*) to allow States and Territories time to incorporate some or all of the recommendations suggested by EPA in this guidance. Approximately half of the States and Territories have submitted a 2002 report which incorporates some or all of the elements of this guidance. In addition, EPA also held five stakeholder meetings in 2001 and 2002 to review and comment on a best practices guide that EPA was developing for States on consolidated assessment and listing methodologies. This guidance ("Consolidated Listing and Assessment [\*13611] Methodology-Toward a Compendium of Best Practices") was released in July 2002. EPA is continuing to work with States to clarify and strengthen their monitoring programs and to help improve the quality and credibility of their lists of waters that require a TMDL.

One commenter stated that withdrawing the July 2000 rule would continue "to make EPA and the States the target of numerous lawsuits-resulting in the courts driving environmental policy, rather than EPA and the States." EPA does not agree with this comment. EPA does not agree that there are, in the commenter's words, "weaknesses" with the currently-effective TMDL regulations that make the Agency any more vulnerable to litigation than if it did not withdraw the July 2000 rule. Indeed, we believe withdrawing the July 2000 rule will render moot the pending D.C. Circuit Court challenge to that rule. Before July 2000, EPA was named as defendant in over 30 lawsuits challenging State lists and the pace of State TMDL development. Since July 2000, only a few such lawsuits have been filed, even though the July 2000 rule never became effective. Clearly, the number of such suits has declined as the States and EPA have done a better job under the 1985/1992 TMDL rules to establish lists and TMDLs. In addition, to date only a handful of lawsuits have been filed challenging any of the more than 7,000 TMDLs that the States or EPA have established. Given these numbers, the Agency does not believe there is anything inherently litigation-provoking in the currently-effective TMDL rules and, based on this record, EPA does not believe that withdrawing the July 2000 rule will result in increased TMDL litigation.



One commenter objected to withdrawing the July 2000 rule because of concerns regarding the inconsistent implementation of the program under the currently-effective regulations and EPA guidance. EPA does not agree that inconsistent implementation of the TMDL program is a significant problem. Nor, for that matter, would implementation of the July 2000 rule remove all potential for divergent implementation approaches by the different States and EPA Regions. As discussed previously, since publication of the July 2000 rule, EPA has issued numerous detailed policy memoranda, national guidance documents, technical protocol documents, and information on best management practices so that States can improve their methods to monitor and list impaired waters, and develop and implement TMDLs in a consistent, yet flexible way. A complete list of these guidance documents can be found at <http://www.epa.gov/edocket>. As noted previously, EPA has issued detailed national guidance to EPA Regions on reviewing and approving lists and TMDLs, ("EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992" (May 20, 2002)) and is working closely with all the EPA Regional Offices to ensure that their regional review and approval of lists and TMDLs correspond with this national policy. In addition, EPA has recently released a guidance on "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (November 22, 2002). This memorandum clarifies EPA's policy on wasteload allocations, specifically that NPDES-regulated storm water discharges must be included in the wasteload allocation component of the TMDL (*see 40 CFR 130.2(h)*) and affirms EPA's view that an iterative, adaptive management BMP approach is appropriate for permitting such discharges.

EPA has also sponsored numerous TMDL and TMDL-related training sessions and meetings to clarify and provide detailed technical support to the States and Regions to help ensure consistency in listing and TMDL development (*see* EPA's website for a complete list of recent activities: <http://www.epa.gov/owow/tmdl/training>.) EPA also has made available to the public the "National TMDL Tracking System" (NTTS), which includes all State-specific data on approved 303(d) lists and approved TMDLs as well as a national summary of impaired waters and TMDLs that have been approved for these waters (<http://www.epa.gov/owow/tmdl/>.) In addition, since the Spring of 2001, EPA has held regular conference calls with EPA Regions and the States to discuss and answer any questions regarding the TMDL program, including technical and policy questions. EPA believes that these guidance documents, the National TMDL Tracking System, training, workshops, and close communication with States and EPA Regional Offices have improved the national consistency in how the TMDL program is implemented at both the Federal and State level, while accommodating the inherent variability in States' water quality standards, land and water characteristics, and available resources.

As to the commenter's point that "there are significant differences between the July 2000 rule and the 1985, 1992 rule \* \* \* [that] cannot adequately be addressed through EPA guidance," EPA notes that its review of the currently-effective TMDL regulations in light of the July 2000 rule is ongoing. EPA has not yet decided what, if any, changes to propose to those regulations. As it continues to consider the need for regulatory changes, EPA will consider the commenter's suggestions regarding which elements belong in regulation and which may be appropriately left to guidance. EPA will also consider the commenter's suggestion that the Agency should allow the public to participate in the development of future program guidance.

One commenter said EPA had not provided enough information to allow it to make a "well-reasoned decision or provide meaningful comment on EPA's proposal to withdraw the July 2000 rule." Nevertheless, that commenter did oppose EPA's proposed action. EPA disagrees with the claim that it did not provide enough information for the public to provide meaningful comment, and given the number of other comments to the proposal addressing EPA's rationale, EPA believes that it adequately discussed its justification for withdrawing the July 2000 rule in the December 27, 2002, preamble.

One commenter opposed withdrawal of the July 2000 rule because it believed that the rule was "necessary" to "aid in the control of nonpoint source pollution." EPA disagrees with this comment. EPA notes that there are numerous existing Clean Water Act authorities and programs, supplemented by other Federal and State programs and initiatives, that address nonpoint source pollution.

One commenter opposed withdrawal of the "TMDL program" because it believed "much time went into the planning of this program to protect waterways \* \* \* [and] it needs to be tied into the NPDES permit program and should be customized to fit individual permits." EPA is not sure it fully understands this comment. To the extent the commenter is opposed to withdrawal of the "TMDL program," EPA notes that it is only withdrawing the July 2000 rule, which has never become effective, and not the TMDL program itself. EPA agrees that it took much planning to develop the July 2000 rule, but, for the reasons already discussed in this preamble and in the December 27, 2002, preamble, EPA has decided to withdraw that rule, regardless of the effort that went into its development. EPA also notes that the currently-effective TMDL program is "tied into the NPDES permit program" in that, among other things, permit [\*13612] efflu-

ent limits must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7. See 40 CFR 122.44(d)(1)(vii)(B). Similarly, 40 CFR 122.4(i) addresses what requirements must be met for a permit to be issued to a new source or new discharger who proposes to discharge a pollutant for which a TMDL has been prepared.

One State commenter, while supporting withdrawal of the July 2000 rule, recommended that as part of this final rulemaking EPA immediately modify 40 CFR 130.7 to require State 303(d) lists every four (instead of every two) years. As EPA continues to consider whether and how to revise the TMDL program, EPA will consider the commenter's suggestion.

One commenter asked for "an evaluation of potential changes from rule making, implementation and funding of Clean Water Act programs and enforcement relative to the Russian River [California] \* \* \* [and an] assurance that this regulatory shift will not result in degradation of either the quality or quantity of our local resources." The commenter did not appear to take a position on the proposed withdrawal of the July 2000 rule, and EPA believes this comment is beyond the scope of the proposal and does not require a response.

One electronic comment merely stated as follows: "We strongly oppose any reduction of restrictions on wetland maintenance." Again, the commenter did not appear to take a position on the proposed withdrawal of the July 2000 rule, and EPA believes this comment is beyond the scope of the proposal and does not require a response.

More than half the commenters requested or encouraged EPA to pursue further rulemaking once the July 2000 rule was withdrawn. Many of these commenters submitted specific recommendations regarding how EPA should structure a new TMDL rule. Some commenters requested that this new rulemaking occur as quickly as possible. One commenter said it "supports EPA's proposed withdrawal of the 2000 rule, assuming that EPA intends to replace that rule in a timely manner with an improved rule now known as the Watershed Rule." Another commenter said it "will only support withdrawal of the July 2000 rule if EPA moves quickly to propose and promulgate a Watershed Rule that provides a comprehensive framework for the evolving TMDL program." Three commenters who supported withdrawal of the July 2000 rule advised against a new rulemaking saying that it "would be disruptive and would only derail State momentum to clean up our waterways." Two other commenters cautioned that a new regulatory proposal "could slow needed progress" and strongly urged the Agency "not to propose any regulatory or other changes that would cripple this vitally important water clean up program."

In response to these comments regarding the future direction of the TMDL program, EPA restates that it has not yet completed its evaluation regarding whether and how to revise the currently-effective TMDL rules. Nor can EPA commit to how long it will take to complete that process. EPA is committed to structuring a flexible, effective TMDL program that States, territories and authorized tribes can support and implement. EPA will carefully consider all of the past and recently-provided commenters' recommendations as it continues to evaluate whether and how to revise the currently-effective TMDL regulations using new regulatory or non-regulatory approaches. EPA, to the best of its ability, will continue to meet and share information with stakeholders regarding this effort, and will provide an opportunity for public comment in a separate **Federal Register** notice if the Agency decides to move forward with a new rulemaking.

After carefully considering all the comments received in response to its December 27, 2002, proposal, EPA is today promulgating a final rule that withdraws the July 2000 rule. EPA is withdrawing the July 2000 rule, rather than allowing it to go into effect, because EPA believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an effective TMDL program. EPA needs additional time beyond April 2003 to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA, and EPA is not sure how long that effort will take. In light of the significant progress States have made in the past three years establishing TMDLs under the currently-effective rules, EPA does not believe that withdrawing the July 2000 rule will impede States' efforts to implement section 303(d) to work towards cleaning up the nation's waters and meeting water quality standards.

Today's final rule does not change any part of the currently effective TMDL regulations promulgated in 1985, as amended in 1992, at 40 CFR part 130 or the NPDES regulations at parts 122-124.

### *III. Statutory and Executive Order Reviews*

#### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, (October 4, 1993)), EPA must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

#### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. [\*13613]

An Agency may not conduct or sponsor and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

#### C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of today's final rule on small entities, I certify that this action, which withdraws the July 2000 rule that has not taken effect, will not have a significant economic impact on a substantial number of small entities. Like the July 2000 rule, this final rule will not impose any requirements on small entities. This action withdraws the July 2000 rule, which has never taken effect.

#### D. Unfunded Mandates Reform Act (UMRA) of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, tribal and local governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$ 100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and

consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Like the July 2000 rule, today's final rule, which withdraws the July 2000 rule that has not taken effect, contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, or tribal governments or the private sector. The final rule imposes no enforceable duty on any State, local or Tribal government or the private sector. Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA. For the same reason, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any requirement on any entity. There are no costs associated with this action. Therefore, today's rule is not subject to the requirements of section 203 of UMRA.

#### E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in executive Order 13132. It finalizes the withdrawal of the July 2000 rule, which has never taken effect. Thus, Executive Order 13132 does not apply to this rule.

#### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. It withdraws the July 2000 rule, which has never taken effect. Thus, Executive Order 13175 does not apply to this rule.

#### G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA. This final rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866. [\*13614]

#### H. Executive Order 13211: Energy Effects

68 FR 13608, \*

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule simply finalizes the withdrawal of the July 2000 rule which has never taken effect. We have concluded that this rule is not likely to have any adverse energy effects.

#### I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rulemaking does not impose any technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on April 18, 2003.

#### List of Subjects

##### 40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

##### 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

##### 40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Air pollution control, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

##### 40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

##### 40 CFR Part 130

Environmental protection, Grant programs-environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control, Water supply.

The authority citation for part 130 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

68 FR 13608, \*

For the reasons stated in the preamble, EPA withdraws the final rule amending 40 CFR parts 9, 122, 123, 124 and 130 published July 13, 2000 (*65 FR 43586*).

Dated: March 13, 2003.

**Christine T. Whitman,**

*Administrator.*

[FR Doc. 03-6574 Filed 3-18-03; 8:45 am]

BILLING CODE 6560-50-P

# Exhibit 16



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\* THIS DOCUMENT IS CURRENT THROUGH REGISTER 2011, NO. 34, AUGUST 26, 2011 \*

TITLE 2. ADMINISTRATION  
DIVISION 2. FINANCIAL OPERATIONS  
CHAPTER 2.5. COMMISSION ON STATE MANDATES  
ARTICLE 4.5. STATE MANDATES APPORTIONMENT SYSTEM

2 CCR 1184.10 (2011)

§ 1184.10. Reviewing an Apportionment or Base Year Entitlement

(a) Upon request of a local agency, school district or state agency the commission shall review the apportionment or base year entitlement pursuant to *Section 17615.8(a) of the Government Code*.

(b) In order to obtain a review of an apportionment or base year entitlement a "Request for Review" shall be filed with the commission.

(c) The request for review shall contain at least the following elements:

(1) Identification of the mandated program(s) that is alleged to require review.

(2) A detailed narrative describing the need to modify the apportionment or base year entitlement.

(3) A statement to the effect that the other mandated programs included in the local agency or school district's apportionment are not overfunded in an amount sufficient to offset any underfunding.

(4) Cost information that outlines the amount of the funding for the total apportionment and the calculations necessary to show that the program(s) needing modification either under or over reimburse the local agency or school district's actual costs by 20 percent or by one thousand dollars (\$1,000), whichever is less.

AUTHORITY:

Note: Authority and reference cited: *Section 17615.8, Government Code*.



# Exhibit 17

**WATER QUALITY CONTROL POLICY  
FOR THE  
ENCLOSED BAYS AND ESTUARIES  
OF CALIFORNIA  
AS ADOPTED BY RESOLUTION NO. 95-84  
ON NOVEMBER 16, 1995**

**STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD**  
(Amendments shown on page 2, Chapter 1.B, 1.b in underscore)

-2

THEREFORE BE IT RESOLVED THAT

The SWRCB:

1. Approves the following amendment to the Policy:

Add to the end of Chapter I.B., 1b.:

Exceptions to this provision may be granted to allow discharges south of the Dumbarton Bridge of treated ground water from ground water cleanup projects. Prior to allowing such a discharge, the Regional Board must make the following findings:

1. That the discharge will comply with all applicable State and Regional Board plans, policies and regulations.
  2. That the reclamation or other reuse of the treated ground water prior to discharge is not practicable.
  3. That there is no other feasible location to discharge the treated ground water.
  4. That the need to dispose of treated ground water outweighs the need to prohibit the discharge south of the Dumbarton Bridge.
2. The SFBRWQCB shall continue to implement provisions of existing State and Federal laws regarding the discharge of toxic pollutants. In particular, the SFBRWQCB shall issue National Pollutant Discharge Elimination System permits in compliance with the Porter-Cologne Water Quality Control Act and applicable State and Federal regulation, including, but not limited to, 40 CFR, Section 122.44(d).
  3. Within three years after Department of Fish and Game (DFG) notifies the SFBRWQCB that specific water bodies support threatened or endangered species and that scientific evidence indicates that certain existing water quality objectives for these water bodies do not adequately protect such species, the SFBRWQCB shall determine, in consultation with DFG, whether these objectives are adequately protective. In cases where such existing objectives do not provide adequate protection for threatened and endangered species, the SFBRWQCB shall develop and adopt adequately protective site-specific objectives for these constituents.
  4. Has determined after careful consideration of all comments testimony, and written reports, that while the proposed amendment may have some impacts on the environment, those impacts are not significant and will not result in degradation of water quality.

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CHAPTER I.  
PRINCIPLES FOR MANAGEMENT OF  
WATER QUALITY IN ENCLOSED BAYS AND ESTUARIES

- A. It is the policy of the State Board that the discharge of municipal wastewaters and industrial process waters <sup>24</sup> (exclusive of cooling waste discharges) to enclosed bays and estuaries, other than the San Francisco Bay-Delta system, shall be phased out at the earliest practicable date. Exceptions to this provision may be granted by a Regional Board only when the Regional Board finds that the wastewater in question would consistently be treated and discharged in such a manner that it would enhance the quality of receiving waters above that which would occur in the absence of the discharge.<sup>24</sup>
- B. With regard to the waters of the San Francisco Bay-Delta system, the State Board finds and directs as follows:
- 1.a. There is a considerable body of scientific evidence and opinion which suggests the existence of biological degradation due to long-term exposure to toxicants which have been discharged to the San Francisco Bay-Delta system. Therefore, implementation of a program which controls toxic effects through a combination of source control for toxic materials, upgraded wastewater treatment, and improved dilution of wastewaters shall proceed as rapidly as is practicable with the objective of providing full protection to the biota and the beneficial uses of Bay-Delta waters in a cost-effective manner.
- 1.b. A comprehensive understanding of the biological effects of wastewater discharge on San Francisco Bay, as a whole, must await the results of further scientific study. There is, however, sufficient evidence at this time to indicate that the continuation of wastewater discharges to the southern reach of San Francisco Bay, south of the Dumbarton Bridge, is an unacceptable condition. The State Board and the San Francisco Bay Regional Board shall take such action as is necessary to assure the elimination of wastewater discharges to waters of the San Francisco Bay, south of Dumbarton Bridge, at the earliest practicable date. Exceptions to this provision may be granted to allow discharges south of the Dumbarton Bridge of treated ground water from ground water cleanup projects. Prior to allowing such a discharge, the Regional Board must make the following findings:

3. Wastes shall not be discharged into or adjacent to areas where the protection of beneficial uses requires spatial separation from waste fields.
4. Waste discharges shall not cause a blockage of zones of passage required for the migration of anadromous fish.
5. Nonpoint sources of pollutants shall be controlled to the maximum practicable extent.

CHAPTER III.  
DISCHARGE PROHIBITIONS

New discharges<sup>24</sup> of municipal wastewaters and industrial process waters<sup>24</sup> (exclusive of cooling water discharges) to enclosed bays and estuaries, other than the San Francisco Bay-Delta system, which are not consistently treated and discharged in a manner that would enhance the quality of receiving waters above that which would occur in the absence of the discharge, shall be prohibited.

The discharge of municipal and industrial waste sludge and untreated sludge digester supernatant, centrate, or filtrate to enclosed bays and estuaries shall be prohibited.

- 3 The deposition of rubbish or refuse into surface waters or at any place where they would be eventually transported to enclosed bays or estuaries shall be prohibited.<sup>64</sup>
- 4 The direct or indirect discharge of silt, sand, soil clay, or other earthen materials from onshore operations including mining, construction, agriculture, and lumbering, in quantities which unreasonably affect or threaten to affect beneficial uses shall be prohibited.
- 5 The discharge of materials of petroleum origin in sufficient quantities to be visible or in violation of waste discharge requirements shall be prohibited, except when such discharges are conducted for scientific purposes. Such testing must be approved by the Executive Officer of the Regional Board and the Department of Fish and Game.
- 6 The discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste shall be prohibited.
- 7 The discharge or by-passing of untreated waste to bays and estuaries shall be prohibited.<sup>74</sup>

D. Administration of Water Rights

Any applicant for a permit to appropriate from a water course which is tributary to an enclosed bay or estuary may be required to present to the State Board an analysis of the anticipated effects of the proposed appropriation on water quality and beneficial uses of the effected bay or estuary.

E. Monitoring Program

The Regional Board shall require dischargers to conduct self-monitoring programs and submit reports as necessary to determine compliance with waste discharge requirements and to evaluate the effectiveness of wastewater control programs. Such monitoring programs shall comply with applicable sections of the State Board's Administrative Procedures, and any additional guidelines which may be issued by the Executive Officer of the State Board.



- 4/ Initial dilution zone is defined as the volume of water near the point of discharge within which the waste immediately mixes with the bay or estuarine water due to the momentum of the waste discharge and the difference in density between the waste and receiving water.
- 5/ A new discharge is a discharge for which a Regional Board has not received a report of waste discharge prior to the date of adoption of this policy, and which was not in existence prior to the date of adoption of this policy.
- 6/ Rubbish and refuse include any cans, bottles, paper, plastic, vegetable matter, or dead animals or dead fish deposited or caused to be deposited by man.
- 7/ The prohibition does not apply to cooling water streams which comply with the "Water Quality Control Plan for the Control of Temperature in Coastal and Interstate Waters and Enclosed Bays and Estuaries of California" - State Water Resources Control Board.

3. The Board hereby declares its intent to determine from time to time the need for revising the policy to assure that it reflects current knowledge of water quality objectives necessary to protect beneficial uses of bay and estuarine waters and that it is based on latest technological improvements.

CERTIFICATION

The undersigned, Executive Officer of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1974.



Bill B. Dendy  
Executive Officer

## COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300  
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**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 20, 2011, I served the:

**Claimant Rebuttal Comments**

*Municipal Regional Stormwater Permit – Alameda County, 10-TC-02*

City of Alameda, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 20, 2011 at Sacramento, California.



Heidi J. Palchik

## Commission on State Mandates

Original List Date: 11/14/2010  
Last Updated: 9/19/2011  
List Print Date: 09/20/2011  
Claim Number: 10-TC-02  
Issue: Municipal Regional Stormwater Permit - Alameda County

### Mailing List

#### TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

---

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