Appeal Case No. B184034

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE CITIES OF ARCADIA, et al., Plaintiffs/Appellants, v. THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, Defendant/Respondent.	Appeal Case No. B184034

CITIES OF ARCADIA ET AL.'S OPENING BRIEF

Appeal From the Superior Court of Los Angeles County
Superior Court Case No. BS080548
Honorable Victoria G. Chaney, Judge

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MISCELLANEOUS

I. INTRODUCTION

The Cities of Arcadia, Bellflower, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardenia, Hawaiian Gardens, Irwindale, Lawndale, Paramount, Pico Rivera, Rosemead, Santa Fe Springs, Signal Hill, South Pasadena, Vernon, Walnut, West Covina, and Whittier (hereafter collectively referred to as "the Cities"), the Building Industry Legal Defense Foundation ("BILD"), and the Construction Industry Coalition on Water Quality ("CICWQ"), appeal from the judgment of the Los Angeles County Superior Court denying Appellants' Petition for Writ of Mandate, and dismissing Appellants' Complaint for declaratory relief.[1]

Respondent California Regional Water Quality Control Board, Los Angeles Region ("Respondent" or "Regional Board") proceeded without jurisdiction and abused its discretion when it issued Order No. 01-182, National Pollution Discharge Elimination System ("NPDES") Permit No. CAS004001, Waste Discharge Requirements For Municipal Storm Water and Urban Runoff Discharges Within the County of Los Angeles, and the Incorporated Cities Therein, Except The City of Long Beach (hereafter the "Permit" or "Order"). The Order was issued as a set of waste discharge requirements ("WDRs") purportedly under the California

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[1] The Cities, BILD and CICWQ are hereafter collectively referred to as "Appellants" or "Petitioners." Appellants submit this oversized brief in accordance with the November 4, 2005 Order of this Court granting Appellants' application to file an oversized opening brief of up to 28,000 words.

Porter-Cologne Act ("PCA") – Water Code § 13000[2] et *seq.*, and as an NPDES Permit purportedly under the Federal Clean Water Act (the "CWA" or the "Act" – 33 U.S.C. § 1251 et seq.).

The trial court erred in denying the requested Petition for Writ of Mandate and in refusing to issue a declaratory judgment, as it failed to follow the requirements of State law, and particularly the PCA and the California Environmental Quality Act ("CEQA" - Public Resources Code ["PRC"] § 21000 et seq.), in many cases finding that such State laws stand as an "obstacle" to the accomplishment of the full purpose of the Clean Water Act's national goal that the discharge of pollutants into the navigable waters be eliminated by 1985, and/or by finding State law was "inconsistent" with the CWA, or did not otherwise apply, and therefore need not be followed (Phase II Statement of Decision ["SOD-II"],) 37 Appellants' Appendix ["AA"] 9770-74, 9776.)

The trial court erred in refusing to issue a writ of mandate, and to grant a declaratory judgment in the Petitioners' favor, for the following reasons:

(1) The Respondent Regional Board was not and is not a State

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[2] All section references herein are to the California Water Code, unless otherwise specified.

[3] The SOD-I1 is located at 37 AA 9751-9795. The Phase I SOD ("SOD-I") is located at 37 AA 9730-9749. Hereafter, all citations to the SODs are to the AA citations only.

agency with Statewide jurisdiction over a class of activities and discharges, and thus, was without jurisdiction to issue the subject Permit (18 AA 4686-4757) or any future NPDES permit, without review and approval by the State Water Resources Control Board ("State Board"). (40 CFR § § 123.1(g)(1) & 123.22(b).)

(2) Part 2 of the Permit, which strictly prohibits discharges from the municipal separate storm sewer system ("MS4") that cause or contribute to a violation of a water quality standard or water quality objective, cannot be "reasonably achieved" (§ 13241(c)), and the Permit terms were not "reasonably required" (§ 13263(a)) and will not "attain the highest water quality which is "reasonable"(§ 13000).

(3) Part 2 of the Permit, which strictly prohibits discharges from the MS4 that cause or contribute to a violation of a water quality standard or objective, and Part 3.C of the Permit, which allows for the incorporation of total maximum daily loads ("TMDLs"), were adopted without consideration of the "economic" impacts, as required by State law (§§ 13241(d) and 13000), despite the fact that the record shows compliance will cost over $53 billion to comply with. (R 6089.)

(4) Part 2 of the Permit, which strictly prohibits discharges from the MS4 that cause or contribute to a violation of a water quality standard or objective, and Part 4.D of the Permit, which requires Standard Urban Stormwater Mitigation Plans ("SUSMPs") for residential and certain other

development and redevelopment projects, were not adopted considering the "need for developing housing within the region." (§§ 13241(e) & 13000.)

(5) The Monitoring and Reporting Program required by Part 6.A.4 and the Appendix to the Permit (30 AA 07835-54), were adopted contrary to the requirements of sections 13267(b) and 13225(c), as Respondent failed to conduct the cost/benefit analysis required by State law.

(6) Respondent ignored section 13360(a), which prohibits the issuance of WDRs or other orders which specify the "design" or the "particular manner in which compliance may be had," and instead: (i) mandated very specific "Numeric Design Criteria" on the Cities to be used in designing post-construction treatment controls (18 AA 4723-24); and (ii) mandated the placement and maintenance of trash receptacles at all transit stops for a number of municipalities (18 AA 4736).

(7) Respondent acted contrary to law by admittedly failing to comply with Chapters 1 and 2.6 of CEQA, and by failing to conduct the environmental review required by CEQA before adopting the Permit. (See § 13389; *see also* 23 CCR § 3733.)

(8) Respondent acted outside of its jurisdiction and abused its discretion by adopting Permit terms that directly conflict with State law requirements, specifically CEQA, without any authority to do so, and in

violation of the separation of powers clause under the California Constitution.

(9) Respondent acted outside of its jurisdiction and abused its discretion by seeking to modify the General Plan requirements of State law, again in violation of the separation of power clause and without authority to do so.

(10) Part 2 of the Permit, which strictly prohibits all discharges which cause or contribute to an exceedance of a water quality standard or objective, exceeds the maximum extent practicable standard under the CWA (33 U.S.C. § 1342(p)(3)(B)(iii)), and is impossible to comply with.

(11) Respondent acted without jurisdiction and abused its discretion when adopting those portions of Parts 3 and 4 of the Permit, which require the reduction of pollutants "in" or "to" the MS4, rather than "from" the MS4. (33 U.S.C. § 1342(p)(3)(B).)

(12) Respondent acted without jurisdiction and abused its discretion when it adopted Parts 4.C and 4.E of the Permit, which require cities to conduct inspections of commercial and industrial facilities, and to inspect and otherwise regulate construction sites over one acre.

(13) Respondent acted without jurisdiction and abused its discretion by unlawfully imposing arbitrary and unreasonable regulations on all construction activities within the Cities pursuant to Part 4.E of the Permit.

(14) Respondent issued an adjudicative decision, i.e., the subject Order, based on evidence and documents never presented at any public hearing to the Board members, and failed to follow the formal hearing requirements under State law, thus resulting in the Respondent denying Appellants a fair hearing.[4]

II. SUMMARY OF ARGUMENT

A. The Trial Court Erred In Finding Respondent Acted Within Its Authority And Not Contrary To The Federal Clean Water Act And Governing Regulations

The federal Clean Water Act (the "CWA" or the "Act") (33 U.S.C. § 1251 et seq.), adopted in 1972, regulates the quality of the "navigable waters of the United States." (33 U.S.C. §§ 1251(a), 1362(7).) To improve water quality, the Act "focuses on two possible sources of pollution: point sources and nonpoint sources." (*San* Francisco *BayKeeper* v. *Whitman* (9th Cir. 2002) 297 F.3d 877, 880.) The CWA targets point sources through technological controls that limit pollutant

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[4] As permitted by this Court's Order dated November 4, 2005, consolidating this appeal with three other related appeals, Appellants herein incorporate by this reference the arguments and points and authorities set forth in the opening briefs of Appellants the County of *Los* Angeles, et al., the Cities of Monrovia, et *al.*, and the City of Industry, et al., except, however, Appellants herein do not incorporate those portions of such briefs asserting or in any way implying that the Respondent herein, or any "***regional***" board, has authority to issue an NPDES Permit, since, under the CWA, only a State agency with "Statewide jurisdiction over a class of activities or discharges," has the authority to issue an NPDES Permit. (40 CFR §§ 123.1(g) & 123.22(b).)

discharges to water bodies through the NPDES permit program. *(Id.;* 33 U.S.C. §§ 1311(a), 1362(12).)

Under the CWA, NPDES permits are issued either by the U.S. Environmental Protection Agency ("EPA") or, after EPA approval, by a state agency with statewide jurisdiction over a class of activities or discharges. (40 CFR §§ 123.1(g)(1) & 123.22(b) [providing that only a State agency with statewide jurisdiction has the authority to issue an NPDES permit, and if more than one State agency seeks authority to issue NPDES permits, each State agency must separate claim approval].)

Recognizing that municipal discharges differ from industrial discharges, Congress created a separate statutory scheme in 1987 to address discharges from municipal storm sewer systems ("MS4s"). The 1987 amendments to the Act expressly distinguish between industrial storm water discharges and municipal discharges. (See 33 U.S.C. §1342(p)(3)(A) & (B).)

As to industrial discharges, Congress required that such discharges strictly comply with all water quality standards, i.e., that: "Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title." (33 U.S.C. § 1342(p)(3)(A).) Section 1311 of the Act requires that dischargers comply with technological requirements, to meet "any more stringent limitations, including those necessary to meet ***water*** quality

standards . . ." (33 U.S.C. § 1311(b)(1)(C); also see Defenders of Wildlife v. Browner ("Browner") (9th Cir. 1999) 191 F.3d 1159, 1164-65 (emphasis added).)

Municipal storm water discharges, are regulated differently than industrial discharges. For municipal discharges, Congress provided as follows:

> "Permits for discharges from municipal storm sewers –
>
> (i) may be issued on a system- or jurisdiction-wide basis;
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> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
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> (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." (Emphasis added.)

In fact, Congress chose to treat municipal storm water discharges in a very similar manner to the way it treated discharges from nonpoint sources, i.e., both are to be governed by the "maximum extent practicable" standard. (See 33 U.S.C. § 1329(a)(1)(C).) Thus, although the CWA requires industrial discharges to strictly comply with water quality standards, the Act specifically does not require that municipalities strictly comply with such standards: "Congress expressly required industrial

storm water discharges to comply with the requirements of 33 U.S.C. section 1311 . . . . Congress chose not to include a similar provision for municipal storm sewer discharges." *(Id*. at 1165.) (Browner, supra, 191 F.3d 1159, 1165.)

Accordingly, nothing in the CWA requires that municipalities strictly comply with state water quality standards. Thus, any attempt by the State to require a municipality to strictly comply with state water quality standards is a requirement that goes beyond the mandates of federal law. *(City* d *Burbank v.* State *Water* Resources Control Board *("Burbank")* (2005) 35 Cal.4th 613, 627 ["Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account 'economic considerations,' such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act."].) As the Respondent here has clearly required that the Cities strictly comply with state water quality standards, and because the CWA only requires cities to comply with such standards to the "MEP" standard, Respondent was required to comply with the State law requirements under the PCA (discussed below), including the need to comply with the "reasonableness" standard, when it adopted the subject Permit.

In Building Industry Association of San *Diego* County *v.* State Water Resources Control Board ("BIA") (2004) 124 Cal.App.4th 866, the Fourth District Court of Appeal considered the validity of language similar to that in Part 2 of the subject Permit (prohibiting discharges which exceed water quality standards or objectives), and characterized the issue as follows: "On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures ***more stringent than a federal standard known as 'maximum extent practicable'."*** (Id. at 871.)

The regulations to the CWA set forth the parameters for the issuance of industrial and municipal NPDES permits, and impose separate and distinct requirements for each. The regulations impose permit requirements on industrial facilities (defined to include construction sites in excess of five acres [40 CFR § 122.26(b)(14)(x)]), as well as small construction activities, i.e., construction sites in excess of one acre (40 CFR § 122.26(c), 40 CFR 122.26(b)(15)(i)).

Municipal NPDES permits are largely governed by specific requirements set forth in subsection 122.26(d) of the regulations, as well as by the general permit requirements under subsections 122.26(a) & (b). Among other things, subsection 122.26(a) describes the effort cities are to undertake to reduce the discharge of pollutants "from" their MS4s. (See,

e.g., 40 CFR § 122.26(a)(1)(iii), (a)(3) and (a)(3)(v); also see § 122.26(d).)

The regulations define the "Adequate legal authority" cities are to maintain, including authority to carry out "inspections" of certain industrial facilities which are "contributing a substantial pollutant loading to the municipal storm sewer system." (See 40 CFR 122.26(2)(d)(iv)(c).) Subsection 122.26(d) also describes the "Proposed Management Program" cities are to adopt to control discharges "from" municipal storm drains, which receive discharges from areas of "new development or significant redevelopment." (40 CFR 122.26(2)(d)(iv)(A)(2).)

In this case, the trial court failed to follow federal law, and wrongly found that the CWA authorized Respondent: (I) to issue an NPDES Permit, even though the Regional Board was and is not a "State" agency with statewide jurisdiction; (2) to impose requirements on the Cities that exceed the MEP standard, without a "safe harbor," and that are impossible to comply with; (3) to reduce pollutants "in" or "to" the MS4, rather than "from" the MS4; (4) to regulate and inspect industrial and commercial facilities and construction sites, including those that are directly regulated by, and to be inspected by, the State (40 CFR § 122.26(c)); and *(5)* to impose arbitrary and unreasonable regulations on all construction sites, such as requiring the control of all “sediments” on site, as well as all construction-related materials (wrongly defined by the trial court to

include sediments) and to require a local Storm Water Prevention Plan Program, even though such a plan is already required by the State under its Statewide General Construction permit. (23 AA at 6152-63.)

B. The Trial Court Erred In Finding Respondent Acted Consistent With State Law

"[S]hortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits." (Burbank, supra, (2005) 35 Cal.4th 613, 631.)

Chapter 5.5 is "to be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act," but to "apply ***only to actions required under the Federal Water Pollution Control Act*** and acts amendatory thereof or supplementary thereto." (§ 13372(a); emphasis added). As explained by the California Supreme Court, "[t]o comport with the principles of federal supremacy, California law cannot authorize this state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the ***mandates of federal law."*** (Burbank, supra, 35 Cal.4th 613, 627-28; emphasis added.)

Under the PCA, the waters of the State are to "be regulated to attain the highest water quality which is ***reasonable,*** considering all

demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) To further this objective, the PCA establishes nine regional boards to prepare water quality plans (known as "basin plans") and to issue "waste discharge requirements" or WDRs (§ 13263(a)). In issuing WDRs, a regional board is to take into consideration "the water quality objectives reasonably required," and "the provisions of Section 13241." (Id.) "Section 13263 directs regional boards, when issuing waste water discharge permits, to take into account various factors including those set out in section 13241." (Burbank, supra, 35 Cal.4th 613, 625.)

Section 13241 requires the establishment of water quality objectives to ensure "the reasonable protection of beneficial uses," while recognizing that "it may be possible for the quality of water to be changed to some degree without unreasonably ***affecting beneficial*** uses." Section 13241 further requires the consideration of a series of enumerated factors: "[F]actors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: "(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area," "(d) Economic considerations," "(e) The need for

developing ***housing within the region."*** (§ 13241 & § 13241(c)-(e); emphasis added.)

In short, the PCA imposes a series of ***"reasonableness"*** standards on a regional board when issuing WDRs, and further conditions the issuance of WDRs on the consideration of "economics" and the "need for developing housing within the region," among other factors. As referenced above, such State law requirements must be complied with unless there is a contradictory federal requirement, i.e., "section 13263 cannot authorize what federal law forbids." (See *Burbank, supra,* 35 Cal.4th 613, 626.)

As interpreted by the trial court, Part 2 of the Permit specifically requires strict compliance with "Water Quality Standards and objectives": "The Regional Board Acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the MEP standard;" and "As noted, even if the Permit did exceed the MEP standard, the Regional Board was within its authority in requiring more stringent standards." (37 AA 9736.) As such, the Regional Board was required to comply with the "reasonableness standards" under State law, and to consider "economics" under sections 13000 and 13241(d) of the PCA and PRC section 21159(c) of CEQA.

Since Federal law plainly does not require municipal dischargers to strictly comply with water quality standards, State law requiring "reasonably required" WDRs, based on water quality conditions that "could reasonably be achieved," must be adhered to, along with the State law compelling Respondent to consider "economic considerations" and the "need for developing housing within the region." (§ 13241(c),(d), & (e).)

Similarly, PRC section 21159 requires that a regional board conduct an "economic" analysis before any performance standard or treatment requirement is imposed. (PRC § 21159(c).) PRC section 21159 provides that the environmental analysis under CEQA is to "take into account a ***reasonable*** range of environmental, ***economic,*** technical factors, population in geographic areas, and specific sites." *(Id.)*

In addition, the PCA specifically conditions the imposition of any monitoring, investigation or reporting requirements on cities and counties, on a regional board first conducting a cost-benefit analysis. Respondent may require technical or monitoring program reports only where it has first determined that the burden, including the costs of such reports, bears a "***reasonable relationship to the need for the report and the benefits to be obtained from the reports"*** and where the regional board provides "the person with a ***written explanation with regard to the need for the***

reports," and identifies ***"the evidence that supports*** requiring the person to provide the reports." (§ 13267(b); emphasis added.)

Similarly, where a regional or state board requires a local agency to "investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; ***the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom."*** (§§ 13225(c) and 13165; emphasis added.)

The trial court wrongly found these costhenefit requirements did not apply to Respondent, instead finding "[a]pplying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as 'an obstacle to the accomplishment of the true purposes and objectives of [the federal law].'") (37 AA 9770.) Yet, the trial court provided no support for its finding and cited to no federal law which "forbids" such a costhenefit analysis. (Burbank, supra, 35 Cal.4th 613, 626.)

The PCA also prohibits a regional or state board from specifying "the design, location, type of construction or particular manner on which compliance may be had" within any order or WDR. (§ 13360.) In this case, the trial court erred in finding section 13360 contradicted federal law. (37 AA 09776, "The Court finds that specific programs required under the Clean Water Act must take precedence over any statutes within the Water Code.") The trial court erred when it refused to find the

Respondent violated section 13360 by imposing a "Numeric Design Criteria" as a part of the Permit's SUSMP requirements (18 AA 4723-24), and by requiring many cities to install and maintain trash receptacles at all transit stops. (18 AA 4736.)

The trial court also wrongly excused the Regional Board from complying with other California laws. Under PRC section 21006, the Legislature found and declared that "this division is an integral part of any public agency's decision making process, including, but not limited to, the issuance ofpermits, licenses, certificates . . . ." (Emphasis added.) Under section 13389, Respondent was only exempt from complying with "Chapter 3" of CEQA, "prior to adoption of any waste discharge requirement [WDR]." Section 13389 does not exempt the Board from complying with other parts of CEQA, and further applies only to WDRs that are "required under the Federal Pollution Control Act." (§ 13372(a).) Thus, here, Respondent was required to have complied with other parts of CEQA, namely Chapters 1 and 2.6, before issuing the Permit. State regulations also provide that the exemption is limited and does not apply to the general policy requirements of CEQA. (23 CCR § 3733.) The trial court incorrectly found Respondent was exempt from complying with "all aspects of CEQA." (37 AA 9739.)

Finally, because CEQA already imposes a specific environmental review process on the Cities to evaluate "projects," and where appropriate,

mitigate potentially significant adverse impacts on the environment, a regional board is without authority to impose requirements that conflict with these legislative requirements. (See Knudsen *Creamery* Co. *v.* Brock ("Knudsen *v.* Brock") (1951) 37 Cal.2d 485, 492.) Respondent's mandated SUSMP program conflicts with CEQA's environmental review process, and thus Respondent exceeded its authority in imposing such requirements and further violated the separation of powers clause under the California Constitution (Cal. Const. Art. 4, § 1). (Id.) For similar reasons, the trial court incorrectly found the Respondent had jurisdiction to force the Cities to amend their General Plans.

For example, CEQA provides developers, such as BILD and CICWQ members, the ability to propose various mitigation measures or feasible alternatives to mitigate a potentially significant adverse impact from a project, rather than being limited to a single mitigation measure, i.e., a SUSMP, to address "project" impacts on surface water quality. (PRC § 21002.) CEQA further allows a lead agency to approve a project with significant adverse impacts where the "public agency finds that specific overriding economic, legal, social, technological or other benefits of the project outweigh the significant effects on the environment." (PRC § 21081(b).) Respondent acted in excess of its jurisdiction when it adopted Permit terms that compelled BILD and CICWQ members, and the Cities, to adhere to a different set of procedures than those set out in

CEQA, and when it negated the rights of BILD and CICWQ members to utilize alternative storm water mitigation measures when developing property throughout the County.

In short, under State law, the trial court wrongly found that the Regional Board: (1) need not comply with the "reasonableness" standards under sections 13000, 13263, 13241; (2) need not consider "economics," under sections 13000 and 13241, or PRC section 21159(c); (3) need not consider the "need for the development of housing within the region" under sections 13241(e) and 13000; (4) need not conduct a cost/benefit analysis, as required under sections 13267(b) and 13225(c), before imposing monitoring and reporting requirements on the Cities; (5) need not comply with section 13360, which prohibits "design" requirements or particular manners of compliance, when imposing the "Numeric Design Criteria" requirements and other requirements under the Permit; (6) need not comply with Chapter 1 and 2.6 of CEQA before issuing WDRs or an NPDES permit; and (7) did not act in excess of its jurisdiction and violate the separation of powers provisions under the California Constitution when it adopted Permit terms that conflict with CEQA and the General Plan requirements under State law.

In addition, Respondents violated Petitioners' rights to a fair hearing and to due process of law by failing to follow formal hearing requirements when adopting the Permit, and by issuing a decision based

on evidence and documents never presented to the Board members at any public hearing.

III. STATEMENT OF THE CASE

Appellants herein filed a petition for writ of mandate and complaint for declaratory relief on January 17, 2003. On April 4, 2003, Intervenors, the Natural Resources Defense Council, the Santa Monica Baykeeper, and Heal the Bay (hereafter collectively "Intervenors") filed a complaint in intervention.

On August 14, 2003, the court denied the collective Petitioners' Motion to Strike and Augment the Administrative Record, which sought to strike a significant portion of the record on the grounds it had never been presented to the Respondent Board in the course of any public hearing, nor been referenced or relied upon by the Board in issuing the subject Order.

On September 3, 2003, the Respondent/Intervenors filed a demurrer and motion to strike portions of the Complaint. On December 5, 2003, the court granted Respondents' demurrer to each of the Petitioners' declaratory relief claims. (13 AA 03295.) The court also granted a motion to strike the Petitioners' contentions that Respondent was without authority to issue an NPDES permit. (13 AA 03287-88.) Likewise, the court struck references to a University of Southern California study, entitled "An Economic Impact Evaluation of Proposed Storm Water

Treatment for Los Angeles County," dated November 2002 ("USC Study"), which study analyzed the potential costs of strictly complying with water quality standards, as required under Part 2, and the TMDLs under Part 3.C of the Permit, on the basis that such evidence was not admissible since the court was striking the declaratory relief claims. (13 AA 03292.)

Petitioners filed a First Amended Complaint on December 19, 2003. On February 19, 2004, the court again granted the Respondent/Intervenors' demurrer to the declaratory relief claims, on the grounds declaratory relief cannot be used to review administrative decisions. (17 AA 04334.)

The trial on the writ of mandate was bifurcated into two phases, Phase 1 and Phase 2. The Phase 1 portion of the trial was held on May 19 and 20, 2004. At the beginning of the trial, the court issued tentative rulings on several issues, including a tentative to grant "Petitioners' request that Section 2 of the Permit be set aside to the extent it exceeds the maximum extent practicable standard." (3 Reporter's Transcript ("RT") 7.) At the conclusion of the Phase I trial, the court granted all requests for judicial notice filed in support of the Phase I papers, taking judicial notice of, among other evidence, a Memorandum with attached Questions and Answers, dated January 30, 2002, from the then Chair of the Respondent

Board, Francine Diamond (the "Diamond Memorandum" – 18 AA 4759-4771). (4 RT 499:17-19.)

After the Phase I trial, the court conducted several hearings related to Petitioners' objections to the court's proposed SOD-I. A major focus of these hearings (August 6, 2004, October 1, 2004, and December 10, 2004), was Petitioners' request that the court include specific language in its SOD-I, consistent with oral statements made by the court, confirming the Permittees would be considered in compliance with Parts 2.1 and 2.2 of the Permit, so long as they were complying in good faith with Parts 2.3 and 2.4 of the Permit. (5 RT 936-39; 7 RT 2131-33; 8 RT 2781-89.) In spite of these statements of the trial court during the hearings on the issue, the court ultimately refused to make such a finding (8 RT 2788-89), and instead came to the opposite conclusion:

> **In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a "safe harbor" and whether or not compliance therewith requires efforts that exceed the "MEP" standard.** (37 AA 9736, emphasis added.)

The trial court also "reject[ed] Petitioners' assertion that . . . MEP is a substantive upper limit on requirements that can be imposed to meet water quality standards," holding that Respondent ***"was within its authority in requiring more stringent standards."*** *(Id;* emphasis added.) The court's finding was consistent with Respondent's position at trial.

(See Respondent's Phase I Brief; 19 AA 4962 ["These restrictions are absolute and unconditioned. . ."].) The court further held that Part 2 of the Permit was not impossible to comply with. (37 AA 9734-36.)

Moreover, the court held that the "issuance of the subject Permit was exempt from all aspects of CEQA," and that the Regional Board acted within its authority in requiring Permittees to amend their CEQA review processes and general plans. (37 AA 9738-39, 9741-42.) Finally, the court found that the Regional Board did not violate the CWA by regulating discharges "into" the MS4, as opposed to regulating discharges "from" the MS4. (37 AA 9745-46.)

Following the Phase I hearing, on June 8, 2004, Petitioners filed a Motion to Amend their Complaint to include a new Seventh Cause of Action for Declaratory Relief on the issues of the MEP standard, the "reasonableness" standard under the Porter-Cologne Act, and the interpretation of Part 2 of the Permit. (23 AA 6049.) Petitioners refiled their motion on August 31, 2004, adding a request that the court grant declaratory relief as to several ambiguous Permit terms challenged during the Phase II portion of the trial. (30 AA 7676.) On October 1, 2004, the court denied the motion on the ground that it was "not the appropriate procedural vehicle to get a declaratory relief action before the court," i.e., the court did not believe a declaratory relief claim could be combined with

a writ of mandate claim in the same complaint. (33 AA 8692-8693; 7 RT 2171:26-28.)

The Phase 2 trial occurred on August 10-12, 2004. At its conclusion, the court denied Petitioners' request for a writ of mandate on all counts. (37 AA 09659.) The SOD-I1 was issued on March 24, 2005. (37 AA 9751-9795.) Among the trial court's determinations were its holdings that the "Porter-Cologne Act . . . did not require the Regional Board to consider economics" or "the need for housing in adopting the Permit." (37 AA at 9771, 9774.) The court also found the Permit's inspection requirements were reasonable (37 AA 6767), and that the cost/benefit requirements under the PCA (§ 13267 and 13225), as well as the PCA's prohibition on imposing a particular design standard or manner of compliance (§ 13360), were "obstacles" to federal law. (37 AA 9770, 9776.)

Likewise, the court upheld the SUSMP and Development Construction Programs. (37 AA 9779, 9787-91.) Finally, after conducting additional hearings, as noted below, the court determined Respondent substantially complied with administrative hearing and due process requirements. (37 AA 9795.)

The court also held, without discussing their elements, that the doctrines of estoppel, waiver, and/or laches, barred the municipal Petitioners from challenging certain aspects of the Permit, including the

Permit's Monitoring and Reporting Program (challenged based on the lack of a cost/benefit analysis), and various arguments concerning the propriety of the SUSMP requirements. (37 AA 9769, 9770, 9776, 9779; *also see* 37 AA 9741, 9745, where the court concluded estoppel, waiver, and laches barred Petitioners' challenges to Respondent's attempt to modify CEQA and the General Plan requirements of State law.)'

On March 25, 2005, a final judgment was entered denying Petitioners' request for a writ of mandate on all issues. (37 AA 09682.) The court subsequently denied Petitioners' Motions for a New Trial and to Set Aside and Vacate the Judgment. (41 AA 10808.)

Accordingly, Appellants herein appeal from the judgment, including the denial of their Motion to Strike and Augment the Administrative Record, the granting of the demurrers to Petitioners' declaratory relief claims, the striking of references to the USC Study, the denial of Petitioners' Motion to Amend the Complaint, and the denial of

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[5] As discussed below, the court consistently misapplied the doctrines of estoppel, waiver, and laches, and failed to issue any findings showing Respondent had met its burden on these defenses. As Petitioners repeatedly challenged the very provisions of the Permit prior to and during the hearing on the adoption of the Permit, the trial court erred in finding Petitioners had waived or were estopped from making their challenges to such provisions, or that the doctrine of laches applied. *(County of Sonoma* v. *Rex* (1991) 231 Cal.App.3d 1289, 1295 ; *First Nat'l Bank v. Maxwell* (1899) 123 Cal. 360, 368; *In re Marriage of Powers* (1990) 218 Cal.App.3d 626,642.)

Petitioners' Motions for a New Trial and to Set Aside and Vacate the Judgment.

IV. STANDARD OF REVIEW

A. Issues Of Law Are To Be Reviewed "De Novo"

In reviewing questions of law, "trial and appellate courts perform essentially the same function" and the review on appeal is de novo. (*Shapell* Industries, Inc. v. Governing Board (1991) 1 Cal.App.4th 218, 233; Rosenblit v. Superior Court (1991) 231 Cal.App.3d 1434, 1443.) Thus, it is up to the appellate court to "independently determine the proper interpretation" of applicable laws. (Clemente v. Amundson (1998) 60 Cal.App.4th 1094, 1102 [on a question of law, the Court is "not bound by evidence on the question presented below or by the lower court's interpretation"].)

The majority of the issues raised in this appeal involve pure questions of law. For example, whether Respondent has authority under the CWA to issue an NPDES Permit, or whether the "reasonableness" standard provided for under the PCA, or the MEP standard set forth in the CWA, constitute substantive upper limits on the requirements in WDRs or in municipal NPDES permits, are pure questions of law. (See *BIA,* supra, 124 Cal.App.4th 866, 881, where the Court held, on the issue of whether the MEP standard was to be applied to municipalities, that: "This argument – concerning the proper scope of a regulatory agency's authority

– presents ***a purely*** legal issue, and is not dependent on the court's factual findings regarding the practicality of the specific regulatory controls identified in the Permit." [Emphasis added.].)

Similarly, whether Respondent was required to consider "economic considerations" or the "need for developing housing within the region" when issuing the Permit, whether a cost/benefit analysis should have been conducted, and whether the Permit violates the section 13360 prohibition on specifying "the design" or a "particular manner of compliance," are all legal questions involving whether various provisions of the PCA apply. (See Sara *M.* v. Superior Court (2005) 36 Cal.4th 998, 1011 ["Ultimately, the interpretation of a statute is a legal question for the courts to decide"].)

Likewise, the issue of CEQA compliance, i.e., whether Respondent was required to have complied with Chapters 1 and 2.6 of CEQA, or was exempt from "all aspects of CEQA" (as found by the trial court), are pure questions of law. Similarly, whether Respondent may impose requirements that conflict with the CEQA review process adopted by the California Legislature, is a pure question of law, subject to "de *novo*" review. (Id.) Further, procedural issues, i.e., whether Respondent denied the Appellants a fair hearing, and whether Respondent failed to conduct a proper hearing on the adoption of the Permit, are "question[s] of law to be decided on appeal." (Rosenblit ***v.*** Superior Court, supra, 231 Cal.App.3d 1434, 1443.)

B. Factual Determinations Must Be Supported By The Weight Of The Evidence

This appeal also challenges the determination by the trial court that certain findings of the Regional Board were supported by the weight of the evidence. The Petition below was brought pursuant to section 13330(d), which provides that the provisions of CCP section 1094.5 are to govern such petitions. For petitions brought under section 13330, the trial court is to "exercise its independent judgment on the evidence." (§ 13320(d).)

Thus, on issues of fact based on the evidence below, the trial court was to have exercised its "independent judgment" and to have based its decision on the weight of the evidence. (*BIA,* supra, 124 Cal.App.4th 866, 879.) In reviewing the trial court determinations on appeal in this regard, an appellant court is to apply a substantial evidence test. (*Fukuda* v. City of Angels (1999) 20 Cal.4th 805, 824.) "Substantial" evidence is not "synonymous with 'any' evidence," but requires evidence "of ponderable legal significance." (Kuhn v. Department of General Services (1994) 22 Cal.App.4th 1627, 1633.) "It must be reasonable, . . . credible, and of solid value." *(Id; Ofsevit* v. Trustees of California State University & Colleges (1978) 21 Cal.3d 763, 773 n.9.) "A decision supported by a mere scintilla of evidence need not be affirmed on review." (Bowman v. Board of Pension Commissioners (1984) 155 Cal.App.3d 937, 944 [the

Court of Appeal "was not created . . . merely to echo the determinations of the trial court"].)

"The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record." (*Kuhn*, 22 Cal.App.4th 1627, 1633.)

V. THE LOWER COURT ERRED IN FAILING TO ISSUE A WRIT OF MANDATE INVALIDATING THE PERMIT

A. Respondent Violated Petitioners' Rights To A Fair Hearing And Due Process Of Law

For the reasons set forth in the brief submitted by the Monrovia *et* al. Appellants, the trial court erred in not finding Respondent denied the Petitioners a fair hearing and due process of law in its adoption of the subject Order. Appellants herein incorporate the Monrovia, *et al* Appellants' brief on this significant issue and, based on such briefing, assert the trial court erred in not issuing the writ of mandate invalidating the subject Order.

B. Respondent Lacked Jurisdiction To Issue the NPDES Permit

Under the CWA, NPDES Permits may only be issued by EPA, or, under specific conditions, by a state agency with statewide jurisdiction over a class of activities or discharges. (40 CFR 123.1(g)(1) and 123.22(b).) In California, pursuant to section 13160, the ***State Board*** is the agency designated to exercise the powers delegated to the State under

the CWA, including the right and obligation to administer the NPDES Program.[6] ("The State Board is designated as the State water pollution control agency for all purposes stated in the Federal Water Pollution Control Act . . . ." [§ 131601.) California's NPDES Program is thus required to be administered by the State Board, pursuant to the CWA and section 13160, and pursuant to a Memorandum Of Understanding between the EPA and the California State Water Resources Control Board, which became effective September 22, 1989. (R 66263-66316.)

Federal regulations promulgated by EPA under the CWA allow for NPDES authority to be shared by two or more state agencies, ***but only where each agency has "Statewide jurisdiction over a class of activities or discharges."*** (40 CFR §§ 123.1(g)(1).)

> NPDES authority may be shared by two or more State agencies but **each agency must have Statewide jurisdiction over a class of activities or discharges.** When more than one agency is responsible **for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.** (40 CFR § 123.1(g)(1).)

40 CFR section 123.21 further requires any state, seeking to administer a program under Part 123 of the regulations, to first make a

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[6] *See* also section 13000, requiring **"a state-wide program** for the control of the quality of all waters of the State,**"** which program is to be administered regionally, but within a framework of state-wide coordination and state policy. (§ 13000; emphasis added.)

submission required by section 123.22 of the regulations. (40 CFR § 123.21(a)(2).) 40 CFR section 123.22(b) then requires, as a part of the submission to be made by the State:

> A description (including organization charts) of the organization of the State agency or agencies which will have responsibilities for administering the program, including the information listed below. **If more than one agency is responsible for administration of a program, each agency must have Statewide jurisdiction over a class of activities.** (40 CFR § 123.22(b); emphasis added.)

Finally, under 40 CFR section 123.1**(f),** any state program approved by EPA "shall at all times be conducted in accordance with the requirements of this part [Part 123]." (40 CFR § 123.1**(f).)**

Accordingly, the federal regulations are clear that if more than one "State" agency is responsible "for issuing permits," (1) ***"each agency must make a submission*** **meeting the requirements"** of the regulations, and (2) ***"each agency must have Statewide jurisdiction over a class of activities or discharges."*** (40 CFR § 123.1)(g)(1); emphasis added.)

Respondent ***Regional*** Board, by definition, is not a state agency with ***'Statewide jurisdiction"*** over a class of activities or discharges. Under section 13201(a), "there is a **regional** board for each of the ***regions*** described in section 13200." Section 13225 then limits the authority of each regional board to its own region ["each regional board, ***with respect***

to its region, shall . . . ."].) Thus, the PCA shows the Respondent was not and is not a State agency with state-wide jurisdiction over a "class of activities or discharges." As such, it did not have the authority to issue the subject NPDES Permit.

Here, there is no dispute Respondent never made a submission to EPA to issue NPDES Permits; nor, in fact, could Respondent have made such a submission, as it is only a "regional" agency with "regional" jurisdiction. Yet, under the federal regulations, for more than one agency within the state to issue NPDES permits, ***each agency must first make a submission meeting the requirements of the federal regulations.*** (40 CFR § 123.1(g)(1).)

Furthermore, it is well established that an agency has no discretion to promulgate a regulation or adopt an order that is inconsistent with its governing statute. (Environmental Protection Info. *Ctr.* v. Dept. of Forestry & Fire Protection (1996) 43 Cal.App.4th 1011, 1022; Agricultural Labor Rel. Bd. v. Sup. *Ct.* (1976) 16 Cal.3d 392, 419; see also Physicians & Surgeons Laboratories, Inc. v. Department of Health *Services* (1992) 6 Cal.App.4th 968.) Accordingly, without the formal approval and issuance of the subject Permit by the State Board, the "Regional Board" had no authority to issue the subject Permit or any future NPDES permits.

The practice of this Respondent (and other regional boards) of issuing municipal NPDES Permits, without the State Board reviewing and issuing such permits, has resulted in inconsistency and confusion in the municipal NPDES permit process throughout California, as varying municipal NPDES permits, with differing terms, have been adopted by different regional agencies, resulting in a patchwork of municipal storm water requirements. These differing municipal NPDES permits throughout the State lack continuity and consistency, and have led to multiple lawsuits challenging similar but varying terms. (See, *e.g.*, BIA, supra, 124 Cal.App.4th 866 [upholding an NPDES Permit issued by the San Diego Regional Board containing similar but different permit terms from the subject Permit]; and City of Rancho *Cucamonga* v. *California* Regional *Water* Quality Board, Santa *Ana* Region, (Cal. Court of Appeal, Fourth Appellate Dist., January 26, 2006) 2006 DJDAR 1126, [another challenge to a municipal NPDES Permit involving similar terms, and issued by yet a third regional board].)[7]

Inconsistent permit terms, multiple lawsuits, and confusion for overlapping jurisdictions, are all problems which illustrate the policy reasons for the federal requirements discussed above, and which demonstrate why a regional board should not be permitted to issue an

[7] In addition, differing NPDES permits may create problems for municipalities who straddle regional board jurisdictional lines, as storm water runoff obviously knows no jurisdictional boundaries.

NPDES permit without specific regulatory direction and approval from the State Board (such as has occurred with the issuance of various general permits for industrial and construction activities [see 18 AA 4698, Permit Finding E.22]).

Despite the fact that there is no credible argument Respondent had independent authority under the CWA to issue the subject NPDES Permit, the trial court wrongly struck Appellants' allegations on this issue. (14 AA 3739-48.) In the SOD-I, the trial court explained the basis for its decision:

> "[T]he Court disagrees with the Arcadia Petitioners that the Regional Board cannot act on behalf of the State Board. The Porter-**Cologne Act sections 13001 and 13225 clearly authorize a regional board to act on behalf of the State Board.**
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> **Porter-Cologne Act section 13240** allows for the adoption of plans by the Regional Board, which clearly gives the Regional Board authority to act in this instance . . . ."

(37 AA 9743-44, emphasis added.)

However, a review of sections 13001 and 13225 shows these sections do not authorize a regional board to act on behalf of the State Board. Section 13001 says nothing about authorizing a regional board to "act on behalf of the State Board," and instead provides that "the state board and regional boards in exercising any power granted in this division

shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state." (§ 13001.)

Further, section 13225 unambiguously allows a regional board only to act ***"with respect to its region,"*** and contains no language authorizing a regional board to sit on behalf of the State Board. (§ 13225.)

Similarly, the trial court's reliance upon section 13240 is misplaced, as it ignores the plain language of section 13245, which provides that: "a water quality control plan, or revision thereof adopted by a regional board, should not become effective ***unless and until it is approved by the state board."*** (§ 13245; emphasis added.) Thus, similar to the issuance of an NPDES permit, when it comes to adopting water quality control plans, a regional board plainly does ***not*** have the authority to adopt such a plan, but only to develop it, with the plans not becoming effective "unless and until it is approved by the state board."

Finally, omitted from the court's analysis is any discussion of the federal regulations, and the specific language in the regulations which authorizes the issuance of an NPDES permit only by a ***State agency*** with ***"Statewide jurisdiction over a class of activities or discharges."*** (40 CFR § 123.1(g)(1).) As Respondent is not such an agency, and given the subject Permit was not issued through, or even reviewed by the State Board, the subject NPDES Permit is the result of a flawed and illegal

process, and one that is directly contrary to the express provisions of the Act. Respondent was without jurisdiction when it adopted the subject Permit.

C. Respondent Exceeded Its Authority And Acted Contrary To The Porter-Cologne Act

1. The Permit is Arbitrary and Contrary to Law, as It Seeks to Achieve Water Quality Conditions that "Could Not Be Reasonably Achieved" and Allows for the Imposition of "Unreasonable" Controls.

In Part 2.1 of the Permit, Respondent expressly prohibits all discharges from the MS4 ***"that cause or contribute to the violation of water quality standards or water quality objectives,"*** irrespective of whether such standards or objectives are "reasonably achievable," or whether the BMPs to be imposed to obtain such standards are to be "reasonably required." (18 AA 4704.) Part 3.C of the Permit then authorizes the Respondent to implement TMDLs through the Permit, which TMDLs are to be designed to achieve water quality standards. (18 AA 4705-06.)[8]

Second, Part 2.4 of the Permit allows for the imposition of "additional BMPs" by the Regional Board, again at the unfettered discretion of the Respondent, without any "reasonableness" limitation imposed on the additional BMPs that may be required. (18 AA 4705.)

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[8] By definition, a "total maximum daily load" "shall be established at a level necessary ***to implement the applicable water quality standards . . . .***" (33 U.S.C. § 1313(d)(1)(C); emphasis added.)

Third, Part 3.C includes a strict compliance standard requiring the Cities to revise their Storm Water Quality Management Program "to incorporate program implementing amendments so as to comply with . . . waste load allocations developed and approved pursuant to the process for the designation and implementation of total maximum daily loads (TMDLs) for impaired water bodies." (18 AA 4705-06.) Thus, Part 3.C, through strict compliance with state water quality standards under Part 2, authorizes Respondent to require strict compliance with numeric limits as set forth in the incorporated TMDLs.

In each of these three instances, the Permit's terms "impose standards stricter than [the federal] 'maximum extent practicable' standard." (BIA, supra, 124 Cal.App.4th 866, 885.) And, in fact, over repeated objections from the Petitioners, the trial court specifically interpreted Part 2 of the Permit as allowing Respondent to require strict compliance with state water quality standards, i.e., more stringent standards than those required under federal law, where it found that: ***"In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."*** (37 AA 9736; emphasis added.) The trial court further expressly recognized that these requirements were ***"more stringent standards"*** than the CWA's "MEP Standard." *(Id;* emphasis added.) Yet, the trial court

failed to recognize that because the CWA does not "mandate" or "require" municipalities to strictly comply with water quality standards, the Respondent was compelled to comply with the "reasonableness" standards under the PCA when adopting the subject Permit.

Under PCA section 13263(a), which is the authorizing section for the issuance of "waste discharge requirements," WDRs may only be imposed where Respondent has taken "into consideration the beneficial uses to be protected, the water quality objectives reasonably requiredfor thatpurpose, other waste discharges, the need to prevent nuisance and the provisions of section ***13241.***" (§ 13263(a); emphasis added.) Thus, section 13263 conditions the issuance of all WDRs on "reasonably required" water quality objectives.

Section 13241, moreover, contains a series of references to the need to adopt requirements that are "reasonable" or that "could reasonably be achieved," where it provides, in relevant part, as follows:

> Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the **reasonable** protection of beneficial uses in prevention of nuisance; however, it is recognized that it maybe possible for the quality of water to be changed to some degree without **unreasonably** affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

. . .

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

(§ 13241; emphasis added.)

This requirement that WDRs be imposed only for water quality conditions ***"that could reasonably be achieved"*** or as needed to ensure the ***"reasonable"*** protection of beneficial uses, are entirely consistent with the general purposes of the Porter-Cologne Act:

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

(§ 13000, emph. added.)

With sections 13263, 13241, and 13000, the Legislature has made the standard of "reasonableness" a fundamental part of the State's Water Quality Policy. Moreover, since the Subject Permit was expressly issued pursuant to State law, including section 13241, Respondent was required to comply with the PCA when issuing the Order.

In Finding E.25 of the Permit, the Regional Board admitted it was issuing WDRs under section 13263, and admitted the provisions of § 13263 and § 13241, including the reasonableness standard, applied:

> California Water Code (CWC) § 13263(a) requires that waste discharge requirements issued by the Regional Board shall implement any relevant water quality control plans that have been adopted; shall take into consideration the beneficial uses to be protected **and the water quality objectives reasonably required for that purpose;** other waste discharges; the need to prevent nuisance; **and the provisions of CWC § 13241.** The Regional Board has considered the requirements of § 13263 and § 13241 . . . in developing these waste discharge requirements. (18 AA 4699; emphasis added.)

In *Burbank,* supra, 35 Cal.4th 613, the Supreme Court held that: ***"Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in section 13241."*** (Id. at 625; emphasis added.) The only exception to this requirement is where the State law requirements conflict with those ***mandated*** by federal law. (Id. at 626-27.) Yet, as explained below, because federal law does not require municipalities to strictly comply with water quality standards, there is no conflict with State law in this case, and as such, State law was required to have been complied with.

In United States v. State Water Resources Control Board ("*U.S.* v. State Board") (1986) 182 Cal.App.3d 82, the State Board issued **revised**

water quality standards for salinity control and for the protection of fish and wildlife because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento–San Joaquin Delta (''Delta''). (Id. at 115.) The State approved these standards with the understanding it would impose more stringent salinity controls in the future. In invalidating the revised salinity standards, the Court in U.S. v. State Board consistently recognized the importance of complying with the policies set forth under section 13000 and the factors listed under section 13241. It emphasized the section 13241 need for an analysis of "economics," as well as the importance of establishing water quality objectives which are ''reasonable'' and adopting ''reasonable standards consistent with overall State-wide interests.''

> In formulating a water quality control plan, the Board is invested with wide authority ''to attain the highest water quality **which is reasonable,** considering all demands being rnade and to be rnade on those waters and the total values involved, beneficial and detrimental, **economic and social, tangible and intangible.'' (§ 13000.)** In fulfilling its statutory imperative, the Board **is required** to ''establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." **(§ 13241),** a conceptual classification far-reaching in scope. *(Id.* at 109-110, emphasis added.)
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> The Board's obligation is to attain the highest reasonable water quality ''considering all

> *demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§13000, italics added.) (Id. at 116, emphasis in original.)
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> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also** all **competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). In addition, **the Board must consider . . .** "[w]ater quality conditions that could **reasonably be achieved** through the coordinated control of *all* factors which affect water quality in the area." (Id. at 118, italics in original; bold face added.)

(*U.S. v. State Board, supra,* 182 Cal.App.3d 82.)

In this case, Respondent failed to consider the policies under section 13000, and particularly the need to adopt WDRs to obtain the highest water quality which is "reasonable," failed to consider the "water quality objectives reasonably required" as set forth under section 13263(a), and failed to consider the "reasonableness" requirements under section 13241, which expressly require the adoption of objectives which will ensure the "reasonable" protection of beneficiary uses based on "water quality conditions that could reasonably be achieved." (§ 13241 and 13241(c).)

The CWA reserves to the state significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the state authority to 'enforce any effluent limit' that is not 'less stringent' than the federal standard." (Id. at 627.) In fact, in *Burbank v.* State Board, the court held that the Clean Water Act "does not prescribe or restrict the factors that a state may consider when exercising this reserved authority . . . ." (Id; emphasis added.) In this case, federal law, at best, gives the State the "discretion" to require strict compliance with water quality standards. (See BIA, supra, 124 Cal.App.4th 866, 883.)

In *BIA*, the court addressed the issue of whether a "regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent ***than*** a federal standard known as 'maximum extent practicable.'" (Id. at 871.) The court found that regional boards have "discretion" under the CWA to go beyond "MEP" in imposing "appropriate" water pollution controls in a municipal NPDES permit, finding "Congress intended the CWA "to provide the regulatory agency with authority to impose standards stricter than a 'maximum extent practicable' standard." (Id at 884-885.) Yet, the BIA court never addressed whether the permit at issue in that case (which similarly required strict compliance with water quality standards) violated State law standards, e.g., the "reasonableness" standard, as compliance with State law was not at issue. (Id. at 879 ["In its appeal, Building

Industry does not reassert its claim that the permit violates state law. . .”7.)

In the Ninth Circuit's decision in Browner, supra, 191 F.3d 1159, the court held that the CWA does ***not*** require municipal dischargers to comply strictly with water quality standards: "Congress did not require municipal storm-sewer dischargers to comply strictly with 33 U.S.C. § 1311(b)(1)(C).” (Id. at 1165.) There, a group of environmental organizations challenged EPA’s decision to issue an NPDES Permit for five municipalities' storm sewers, without requiring said Cities to strictly comply with numeric limitations to ensure compliance with water-quality standards. (Id. at 1161.) Instead, EPA required that the Cities of Tempe, Tucson, Mesa, and Phoenix, and Pima County, Arizona, comply with a series of "best management practices" which included a number of structural environmental controls, such as storm-water retention basins and infiltration ponds.

The Cities in Browner, however, were not required to strictly comply with the state adopted water quality standards. (Id.) Instead, EPA determined that the "best management practices" included in the permits were sufficient to ensure compliance with the state water quality standards, even though they did not require compliance with numeric limitations. (Id. at 1161.)

Several environmental organizations sued to force the cities to strictly comply with water quality standards, and the Ninth Circuit found the environmental organizations were arguing for an interpretation of section 33 U.S.C. § 1342(p)(3)(B)(iii) that would render the language of the Act "superfluous," a result the Court found was to be avoided so as to give affect to all provisions enacted by Congress. (Id. at 1165.) Instead, the Browner Court found the "statute unambiguously demonstrates that Congress did not require municipal storm-sewer dischargers to strictly comply with 33 U.S.C. § 1311(b)(1)(C)," i.e., the provision of the CWA that requires industrial dischargers to strictly comply with water quality standards. (Id. at 1165.) The court further recognized that Congress chose to require municipalities to "reduce the discharge of pollutants to the maximum extent practicable." (Id. at 1165.)"[9]

The BIA and Browner holdings that the CWA does not require municipalities to strictly comply with water quality standards, and further that the EPA/State only "had the discretion" to require cities to strictly

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[9] The Browner court also addressed the intervenor cities' contention therein that "the EPA may not, under the CWA, require strict compliance with State water-quality standards, through numeric limits or otherwise." (Id. at 1166.) The Ninth Circuit disagreed that EPA ***may*** not require strict compliance with water quality standards, finding that section 1342(p)(3)(B)(iii) of the Act "gives the EPA ***the discretion*** to determine what pollution controls are appropriate," and thus that "EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants." (Id at 66; emphasis added.) However, as the court in BIA recognized, this part of the Browner decision was "dicta." (124 Cal.App.4th 866, 886.)

comply with "state water quality standards," confirms that Parts 2 and 3.C of the Permit, which require municipalities to strictly comply with water quality standards, including strict compliance with water quality standards via TMDLs, are an attempt by Respondent to "impose municipal storm sewer control measures more stringent than a federal standard known as 'maximum extent practicable.'" (See BIA, supra, 124 Cal.App.4th 866, 871.)

In light of the trial court's interpretation of the Permit that it requires compliance with State water quality standards "without a safe harbor" whether or not compliance "required efforts that exceed the MEP standard," and authorizing Respondent to impose "more stringent standards" than MEP, the trial court erred when it upheld the Permit, without first requiring the Respondent comply with the "reasonableness" standards under State law. (§ 13263, 13241 and 13000.)

2. Respondent Failed to Consider the Economic Impacts of Parts 2 and 3.C of the Permit

The trial court additionally erred in finding that Respondent was not required to consider "economics" when adopting the Permit, "because the Board considered economics at an earlier stage in setting water quality objectives in the Los Angeles Basin Plan," and that "[t]his Court ***is under the impression*** that when the Regional Board adopted the Basin Plan, it took economic considerations into account." (37 AA 9771.)

The trial court also erred when it found: "although the Regional Board was not required to consider economics in its adoption of the permit, as opposed to the Basin Plan, there are numerous findings and documents in the administrative record that show that there were economic considerations." (37 AA 9772.) Yet, the court failed to cite to any evidence in the record to show Respondent properly considered the "economic" impacts of strictly complying with water quality standards. And, in fact, the evidence in the record directly refutes the contention that a legitimate consideration of the economic impacts of Parts 2 and 3.C was ever conducted by Respondent, when it adopted the Permit. (See discussion infra and R7592, R7937-39 [where the Respondent arbitrarily rejected the Caltrans study and other evidence showing that the compliance costs with Parts 2 and 3.C of the Permit would "exceed $50 billion," and instead erroneously relied upon a projection based upon the cost of compliance with the 1996 Permit, a permit which contained no provision requiring strict compliance with water quality standards].)

Initially, it cannot be over-emphasized that the trial court made its determination that Respondent need not consider "economics" when issuing the Permit, because the "Court [was] ***under the impression*** that when the Regional Board adopted the Basin Plan, it took economic consideration into account." (37 AA 09771; emphasis added.) Yet, there are no citations to evidence to support this finding, and in fact there is no

evidence anywhere in the record which shows Respondent ever considered "economics" vis-a-vis storm water and urban runoff, when the Basin Plan was adopted. Moreover, the issue of the validity of the Basin Plan was not litigated in the underlying action.

Second, it is clear from recent authority *(Burbank, supra,* 35 Cal.4th 613) and from the plain language of Water Code sections 13241 and 13000, that regardless whether Respondent had properly considered the "economic" impacts of requiring storm water dischargers to strictly comply with water quality standards when the Basin Plan was adopted, that the "economic" impacts on the discharger from this Permit were still required to have been considered at the time of Permit adoption. *(Id*. at 869, ***"The plain language of sections 13263 and 13241 indicates the Legislature's intent. . . that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit."*** (emphasis added) *Also see, City of Arcadia et al. v. State Water Resources Control Board (Arcadia* v. *State Board")* (Cal. Court of Appeal, Fourth Appellate Dist., January 26, 2006) 2006 DJDAR1145, where the court noted that the Supreme Court in *Burbank* "concluded that in applying Water Code section 13241, the Legislature intended 'that a regional board consider the *cost of compliance* [with numeric pollutant restrictions] when setting effluent limitations in a waste water discharge permit.'" *Id.* at 1150; emphasis in original.)

Third, the evidence in the record that was before both the trial court and Respondent on the issue of the "economic" impacts from Parts 2 and 3.C, showed significant adverse economic consequences from having to comply with such provisions. It also showed that Respondent, rather than considering this evidence, rejected it out-of-hand.[10] In particular, in both its Responses to Comments and during the adoption hearing, Respondent arbitrarily rejected the various Caltrans studies and other evidence showing that the cost to comply with Parts 2 and 3.C. of the Permit could "exceed $50 billion." (R 7592 & 7537-38.)

The Cities presented Respondent with detailed economic studies (collectively, the "Cost Studies") showing that the cost of the

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[10] Justice Brown, in her concurring opinion in *Burbank, supra*, 35 Cal.4th 613, 632, commented on the constant gamesmanship this Respondent engaged in when it came to considering economics, observing as follows:

> For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of **"gotcha"** by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so." (Emphasis added.]

implementation of Parts 2 and 3.C of the Permit ***could exceed fifty billion dollars*** over the next 20 years. (See R6070-R6133 "Financial and Economic Impacts of Storm Water Treatment Los Angeles County NPDES Permit Area" presented to California Department of Transportation Environmental Program, Report I.D. #CTSWRT-98-72, November, 1998, by Stanley R. Hoffman Associates ("Caltrans Study") at R6089, concluding meeting storm water objectives would require capital costs of $53.6 billion; "Southern California Association of Governments Staff Report to Energy and Environment Committee dated August 23, 2001 (Subject: Regional Solutions for Managing Stormwater Pollution) (the "SCAG Report") at R6069, concluding that "[s]tudies conducted to estimate the cost of removing pollutants from Los Angeles County storm water indicate that capital plant alone needed for this mission will cost more than $50 billion"; "COST OF STORM WATER TREATMENT FOR THE LOS ANGELES NPDES PERMIT AREA," June, 1998, by Brown & Caldwell, prepared for the California Department of Transportation (R6134-6189) at R6146-47, giving "conservatively low" estimates of the costs of treating Los Angeles Area stormwater of $33-73 billion in capital costs, depending upon the level of treatment, along with an additional $68-$199 million per year in operating and maintenance costs; and "COST OF STORM WATER TREATMENT FOR CALIFORNIA URBANIZED AREAS," October, 1998, prepared for California Department of Transportation, by Brown &

Caldwell (R6194-6448) at R6226, concluding that "Statewide stormwater collection and treatment costs range from $70.5 billion for Level 1 to $113.7 billion for Level 3. Annual operations and maintenance costs range from $145.2 million/year for Level 1 to $423.9 million/year for Level 3."[11]

Rather than considering this evidence, Respondent dismissed it out-of-hand, claiming instead that Permittees had submitted budgets (based on ***the 1996 Permit,*** which did not contain the disputed Parts 2 and 3.C language) showing that the cost would be only about $145 million to comply: "Permittees self-reported budget for implementation of the Permit requirements for 2001-2002 is about $145 million, a fraction of the projected costs claimed in the $50 billion." (R 7592.)

A similar contention was made by Respondent at the December 13 hearing before the Regional Board, in response to the question, "Well, $145 million is a far cry from $50 billion. Do you have any explanation for that discrepancy?" (R 7937.) The response by Board staff was that it

[11] Likewise, the USC Study concluded that a number of treatment plants would need to be constructed to strictly comply with the water quality standards, and that the cost of such plants could reach as high as $283.9 billion over the next 20 years. (AA 00057.) Although the study was not prepared until November 2002, after the Respondent approved the subject Permit, and thus was not available at the time the Permit was adopted, it is relevant evidence in connection with Petitioners' declaratory relief claims on the importance of the Respondent considering economics when imposing such requirements on municipalities in future permits. The subject Permit is scheduled to expire on December 12,2006. (Permit 70.)

believed the $50 billion figure was inflated because "$6 billion of that is in land acquisition costs. And here they are assuming 14,000 acres at a cost of $435.00 per acre." (R 7937-38.) Board staff further responded that: "Now, another example of why we think the costs may be inflated, Permittees estimate their storm water costs under the ***existing Permit*** are almost $150 million a year." (R 7938, emphasis added.)

Thus, rather than considering the evidence of the excessive costs of strictly complying with water quality standards under Parts 2 and 3.C of the Permit, instead the Board arbitrarily rejected these estimates, and relied upon estimates based on compliance with a 1996 Permit that did ***not*** contain the objectionable water quality standards language. (See R 28670-71 [1996 Permit].)

The Porter-Cologne Act requires that "economics" be considered in issuing WDRs such as the subject Permit. (See § 13000 and 13241(d).) Section 13000 provides, in relevant part, as follows:

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

The Legislature further determined in section 13000:

> . . . that factors of precipitation, topography, population, recreation, agriculture, industry and **economic development** vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy. (Emph. added.)

In addition, as discussed above, section 13263, which governs the issuance of waste discharge requirements, mandates that "the provisions of Section *13241*" be "take[n] into consideration" before the State issues a discharge permit. (§ 13263(a).) Section 13241, in turn, requires each regional board to consider a series of factors, including "Economic considerations." (§ 13241(d) (ernph. added).)

Even the Respondent, in finding E.25 of the Permit, admitted that "California Water Code (CWC) § 13263(a) requires that waste discharge requirements issued by the Regional Board... shall take into consideration the . . . provisions of CWC § 13241." (18 AA 4699.)"

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[12] In addition, under PRC section 21159, an "economic" analysis was required under CEQA, as Respondent was requiring compliance with "performance standards" i.e. strict compliance with water quality standards, and effectively imposing "treatment" requirements upon the Permitees. (PRC § 21159(c).) PRC section 21159 provides that the environmental analysis under CEQA is to "take into account a reasonable range of environmental, economic, and technical factors, population in geographic areas, in specific sites." *(Id.)* Part 2 of the Permit is specifically requiring compliance with "water quality standards" and as such, in addition to the need to consider economics under sections 13000 and 13241(d), Respondent was required to have conducted an economic analysis under CEQA. (PRC § 21159(c).)

The requirements under State law to consider "economics" before issuing an NPDES permit are further entirely consistent with the requirements of federal law. Under the federal regulations, a "fiscal analysis" of the necessary capital operation and maintenance expenditures necessary to comply with certain Permit programs is required, including an analysis of the source of the funds needed to meet the necessary expenditures and including an analysis of the legal restrictions on the use of the funds. (40 CFR 122.26(d)(2)(vi).) The regulation provides as follows:

> (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 paragraph (d)(2)(iii) and (iv) of this section [the "Source Identification" provisions of the regulations and "proposed management program" requirements]. 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. (40 CFR § 122.26(d)(2)(vi).)

As held by the California Supreme Court in *Burbank*, under the CWA, "each state is free to enforce its own water quality laws so long as its effluent limitations are not 'less stringent' than those set out in the Clean Water Act." *(Id*. at 613, 620.) The *Burbank* Court recognized and quoted the PCA, specifically including section 13000, and noted the need

to consider all demands being made on the waters, including "economic and social, tangible and intangible" (Id. at 619). More importantly, the *Burbank* court found that:

> **The plain language of Sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a Regional Board consider the costs of compliance when setting effluent limits in a wastewater discharge permit.** (Id. at 625; emphasis added.)

The only qualification the *Burbank* court found in this regard is that "Section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a waste discharge permit, to use compliance costs to justify pollutant restrictions that did not comply with federal clean water standards." (Id. at 626; emphasis added.)

Clearly, there is nothing in federal law that prohibits the state from considering "economics" when requiring strict compliance with water quality standards, and, in fact, federal law provides for the opposite, i.e., it requires a "fiscal analysis" of certain programs to be imposed upon municipalities." Moreover, as held by the courts in Browner and BIA, because federal law does not require municipalities to strictly comply with state water quality standards, and instead only requires compliance with the MEP standard, the subject Permit imposes requirements that are "stricter" than required under federal law.

Accordingly, by the plain language of sections 13000, 13263 and 13241(d), PRC section 21159, as well as controlling precedent and Respondent's own admission with finding E.25, Respondent was required to have considered the "economic" impacts of Parts 2 and 3.C. at the time it adopted the subject Permit. The trial court's finding to the contrary was in error and a writ of mandate should have issued.[13]

Moreover, it is manifest that to "consider... economic considerations" means to do far more than to arbitrarily reject the only evidence submitted which addressed the cost of compliance with the Permit. State Board policy directives on the topic of "costs" in the context of storm water pollution controls demonstrate that costs must considered in light of the effectiveness of the mandated pollution controls:

> To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are **technically feasible (i.e., are likely to be effective) and are not cost prohibitive. . . .** In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:
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> . . .

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[13] Further, as the trial court determined the "State Board has followed the practice" that no consideration of section 13241 factors is required, and given that the disputed Permit is a five-year permit, scheduled to expire on December 12, 2006, and to be renewed each five-year interval thereafter, a declaratory judgment should have been granted, interpreting the PCA, and providing for a declaratory judgment forcing the Respondent to consider "economics" before issuing future WDRs and NPDES permits. (See Proposed Second Amendment Complaint, AA 06046.)

> d. Cost: **Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved."**
>
> e. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc." (R73175-R73176, February 11, 1993 Memo entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, State Water Resources Control Board.)

The consideration of "economics," thus, means first identifying technically feasible Best Management Practices ("BMPs") and then determining both the costs and the effectiveness of such BMPs. In this case, as to Part 2 and 3.C, the record contains no evidence where the Respondent evaluated the BMPs necessary to strictly comply with water quality standards and TMDLs, and their technical feasibility. Nor is there any evidence Respondent considered the "costs" of these BMPs or their benefits. The costs to be considered must have a "reasonable relationship to the pollution control benefits to be achieved." (Jennings Memo, R73176.)[14]

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[14] In *Arcadia v.* State Board, supra, 2006 DJDAR 1145, 1152.) the Court found that it was unclear exactly what type of "economic considerations" were necessary to satisfy section 13241, but held that a detailed analysis and "discussion of compliance costs" was adequate. (Id. at 1150-1151.) While Appellants disagree that such a discussion, by itself, is enough to satisfy section 13241, still, here, Respondent provided no "discussion of compliance costs" to comply with Parts 2 and 3.C of the Permit.

The record before the trial court was completely void of any evidence Respondent conducted any analysis of the "economic" impacts of strictly complying with water quality standards or implementing TMDLs. In fact, the evidence shows Respondent refused to conduct the necessary analysis, or even to acknowledge the BMPs that would likely be needed to comply with Parts 2 and 3.C. (R 7592,7537-38)

Further, in its Fact Sheet/Staff Report for the Permit, the Board recognized that: "Because storm water runoff rates can vary from storm to storm, the statistical probabilities of rainfall or runoff events become ***economically significant*** and are central to the control of pollutants through cost effective BMPs." "Financing the MS4 program offers a considerable challenge for municipalities." (R 8073-74, emphasis added.) By recognizing the economically significant costs involved in addressing storm water runoff, and the considerable challenge for municipalities to comply with the Permit terms, but simultaneously refusing to conduct any kind of cost analysis on the economic impacts of complying with Part 2 and 3.C, the Respondent abused its discretion, and acted arbitrarily and capriciously.

Respondent's only finding regarding its compliance with the requirement that it consider "economics" in adopting the Permit was its boilerplate statement that "[t]he Regional Board has considered the requirements of § 13263 and § 13241 . . . in developing these waste

discharge requirements." (18 AA 4699.) Such a finding is a clear admission that "economic" impacts should have been considered, but is wholly deficient as a finding to meet the requirement of the statute, as it is boilerplate, and without any supporting evidence. (American Funeral Concepts-American Cremation Society v. Board of Funeral Directors & Embalmers ("American Funeral") (1982) 136 Cal.App.3d 303, 309, "To pass muster findings must reveal the lines of factual and legal conclusions upon which the board relies.")

"The absence of specific findings prevents [the Court] from fulfilling [its] duty under Code of Civil Procedure section 1094.5 to conduct a meaningful judicial review of the challenged administrative decisions." (Glendale Memorial Hospital & Health Center v. State Dept. of Mental Health ("Glendale Memorial") (2001) 91 Cal.App.4th 129, 140 [conclusory findings require remand to agency].) Moreover, Respondent's unsupported finding in no way acts "to bridge the analytic gap between the raw evidence and ultimate decision or order." (Topanga Assn. for Scenic Community v. County of *Los* Angeles ("Topanga") (1974) 11 Cal.3d 506, 515.)

A writ should have been issued in this regard, as the "economic" impacts of Parts 2 and 3.C were never considered, as required by law.

3. Respondent Was Required to Consider the Need for Developing Housinp Within the Region

As it did with respect to the application of section 13241 on the issue of "economics," the trial court found that, with respect to the need to consider "housing" in the region, "[t]he Court disagrees that the statute applies to the Regional Board's actions in adopting the permit." (37 AA 9773, Phase II SOD 23.) The trial court's decision again flies directly in the face of the *Burbank* decision, where there the Court held that, ***"Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in Section 13241."*** (35 Cal.4th 613, 625.) As the trial court's decision is directly contrary to controlling precedent, the court erred in concluding Respondent need not comply with the requirements of State law.

Also, as it did with the issue of "economics," the trial court went on to find that although Respondent was not required to consider the need for "housing" when adopting the Permit, there was "evidence in the record that shows the issue of housing was considered." (37 AA 9774, Phase II SOD 24.) Yet, the evidence it cites to is largely evidence submitted by the Petitioners, evidence Respondent refused to even consider.

Under existing State law, "[***t***]***he availability of housing is of vital statewide importance"*** and is ***"a priority of the highest order."*** (Government Code § 65580(a); emph. added.) Of particular concern is

the "provision of ***housing affordable to low- and moderate-income households,"*** and the Legislature has stressed that "Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing ***to make adequate provision for the housing needs of all economic segments of the community"*** (Govt. Code § 65580(c),(d); emph. added.) Undoubtedly, in part for this reason, the PCA requires that Respondent consider the impacts of its WDRs on regional housing needs before adopting discharge requirements. (§ 13241(e).) Section 13241(e) provides that "factors to be considered by a regional board in establishing water quality objectives ***shall include,*** but not necessarily be limited to . . . (e) ***The need for developing housing within the region."*** (§ 13241(e), emph. added.)

There can be no real dispute that Parts 2 and 4 of the Permit will have significant impacts on the development of housing in the Los Angeles region. First, the SUSMP provisions contained in the "Development Planning Program" in Part 4.D of the Permit (18 AA 4722-4725) impose new storm water runoff controls on a broad range of commercial, ***residential*** and industrial development projects. The SUSMP requirements specifically apply to "the following categories of developments: "(1) ***Ten or more unit homes (includes single family homes, multifamily homes, condominiums, and apartments),"*** and "(7) ***Redevelopment projects in the subject categories that meet***

Redevelopment thresholds." (18 AA 4723.) (Redevelopment is defined, in relevant part, as i.e., "land-disturbing activity that results in the creation, addition, or replacement of 5,000 square feet or more of impervious surface area on an already developed site." 18 AA 4746.)

The Permit additionally imposes specific "Numerical Design Criteria" and "post-construction Treatment Control BMPs" to mitigate storm water pollution on "b) ***Housing developments (includes single family homes, multifamily homes, condominiums, and apartments) of ten units or more."*** (18 ***AA*** 4724, emph. added.)

Beyond directly regulating housing developments, the Permit indirectly impacts housing availability and housing costs by imposing extensive new controls on construction sites. For example, the Permit provides that the Permittees may require that construction sites retain all sediment runoff, and may limit grading activities to particular seasonal periods, i.e., no grading during the wet season. (18 AA 4729.)

Moreover, the Permit impacts housing by placing specific restrictions on maintenance and transferability. Owners of all residential developments subject to the SUSMP, in addition to implementing site-specific development controls, must also enter into maintenance and transfer agreements, which, among other things, impose written conditions on sales and leases, and require covenants and restrictions("CCRs") on title to residential properties. (18 AA 4726.)

Also, the treatment control BMPs needed to comply with Parts 2 and 3.C will require a significant amount of land ($6.1 billion worth, as estimated in the Caltrans Report, R6091), which will plainly have an impact on the availability of land for housing and the cost of land and housing within the region.

Furthermore, the record is replete with evidence regarding the potential impact of the various Permit provisions on housing availability and costs in the Los Angeles Region.

> Less than one half of the Los Angeles families earning a medium income can afford a medium priced home today. This is 20 percent below national levels. . . . At any given night here in the southland, 100,000 people do not have a place to sleep at night that they call home. 50 percent of those are children and 50 percent of those are children under the age of five.
>
> . . . The regulations that were proposed and adopted by the L.A. Board do not take into account any variation in housing type. Ten units of single-family detached housing are treated the same as ten units of **multi-family** condominiums. This is a **one-size-fits-all** [edict] which shows no sensitivity to affordable and (inaudible) housing.
>
> * * *
>
> Worse, the proposed regulation hits in-fill hardest where land is scarce and expensive. Most in-fill projects are site-constrained. Site-specific volumetric controls could become a major expense for these projects. According to the Department of Housing and Redevelopment's recently issued report, Raising the Roof, most of the state has enough land capacity to accommodate housing needs, except Los Angeles. Let me repeat that. Except Los Angeles County. (Testimony of

Dee Zinke, Executive Officer for the Building, Industry Association for the Greater Los Angeles and Ventura Counties; R73811-13.)

* * *

[T]here are two areas that concern me as someone trying to provide housing for people in California.

One is the requirement that post-development run-off shall not exceed the predevelopment run-off on property, and the other is the requirement on housing of ten units or more, whether they're multi-family or not. This makes it very difficult to do in-fill housing, which is what's mandated by most of our comprehensive plans and smart growth concepts to reuse brown fields to provide in-fill housing and to increase density within cities. It makes it very difficult to take a one-acre parcel that's in a downtown area and put ten units on it. It's almost impossible to reach that prerun-off stage from a technical point of view as a builder. (Lynn Jacobs, President of Ventura Affordable Homes; R73745.)

In addition to this testimony, letters submitted to Respondent stress the lack of adequate available housing in the Region and the Permit's impact on housing:

Regulations such as this Proposed Permit can have a detrimental affect on our members' ability to provide more affordable urban, **infill** homeownership opportunities. California has 9 of the nation's 10 least affordable housing markets, including 7 of the top 7. A kindergarten teacher in Downtown Los Angeles needs over $78,096 in additional income to afford the **median-**priced home. Yet, we are under-producing housing. Last year marked the **10th** consecutive year of housing production at roughly 50 percent of demand. (R2037.)

* * *

It is not clear why residential development is even included as a priority development category when the

> water quality data collected to date has not shown residential land use to be of a high concern. Furthermore, even if residential development is included as a priority development, there is no reason why it should have a lower threshold **(10+** homes) than **commercial/industrial** development (100,000 square feet) when the water quality data shows that commercial and industrial land use is of much higher concern than residential land use. Also, the inclusion of residential development in the SUSMP, is helping to prevent **"smart** growth" by creating a disincentive to high density, **infill** development that is needed to responsibly increase housing supply and affordability in urban, job rich areas of Los Angeles. (R2042.)

Despite this and other evidence showing that that the Permit places significant new and costly burdens on the development and redevelopment of housing within the Region, Respondent ***made no specific finding*** that it had considered the impact of the Permit on the "need for developing housing within the region." (§ 13241(e).)

Rather, as with economics, Respondent's only finding regarding its compliance with the requirement that it consider the "need for housing within the region" was its boilerplate statement that "[t]he regional Board has considered the requirements of § 13263 and § 13241 . . . in developing these waste discharge requirements." (18 AA 4699.) While this finding is a clear admission that "housing impacts" should have been considered, it is wholly insufficient as a finding, as it is boilerplate, does not even refer to housing, and is without supporting evidence. *(American Funeral,*

supra, 136 Cal.App.3d 303, 309; *Glendale* Memorial, supra, 91 Cal.App.4th 129, 140; Topanga, supra, 11 Cal.3d 506, 515.)

The Regional Board's failure to a make an adequate finding, supported by evidence, that it properly considered the "need for housing within the region" as required by section 13241 was an abuse of discretion, and the trial court should have issued a writ of mandate invalidating the Permit for this reason. (*Hadley* v. City of Ontario (1976) 43 Cal.App.3d 121, 129.)

4. Respondent Failed to Perform a Cost-Benefit Analysis Before Imposing Monitoring and Reporting Obligations under the Permit

State law mandates that Respondent conduct a cost-benefit analysis before imposing monitoring and reporting obligations through waste discharge requirements (§ 13267(b)), or before imposing, on local agencies, an obligation to investigate and report on technical factors involved in water quality control or to obtain and submit analyses of water. (§§ 13225(c) and 13165.)

In this case, the trial court wrongly concluded that the cost/benefit requirements under State law did not apply, finding that federal authority mandates a monitoring and reporting program, but does not require an additional cost/benefit analysis in imposing such requirements. (37 AA 9769.) Yet, the trial court pointed to nothing in federal law which "forbids" a state from imposing a monitoring program that has benefits

that are reasonably related to its costs. (Burbank, supra, 35 Cal.4th 613, 626.) The trial court erred in failing to issue a writ of mandate, as Respondent was required to comply with Water Code sections 13267(b) and 13225(c) in imposing the monitoring and reporting requirements under the subject NPDES Permit.

The trial court also erred when finding that "for those Petitioners who were part of the joint ROWD submission, the doctrines of estoppel and waiver apply" (37 AA 9769), and in dismissing the Petitioners declaratory relief claim in this regard with respect to future WDRs and NPDES Permits. (See discussion infra.)

Finally, the trial court wrongly found that even if the Respondent "was required to consider the costs and benefits of the Permit, there is substantial evidence in the record of this consideration." (37 AA 9770.) In fact, there is no evidence in the record to support a finding that a cost/benefit analysis was ever conducted. To the contrary, the evidence shows Respondent explicitly rejected Petitioners' assertion that it was required to perform such an analysis. (R7950.)

Section 13267, entitled "Investigation of Water Quality; Report; Inspection of Facilities," provides, in part, as follows:

> (b)(1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged . . . 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. (Emph. added.)

Here, as the Respondent imposed "waste discharge requirements" on the Cities requiring monitoring and technical reporting, a cost/benefit analysis was required, along with a ***"written explanation with regard to the need for the reports"*** and the evidence that supports requiring the reports. (§ 13267(b)(1).)

Similarly, section 13225 required Respondent to conduct a cost/benefit analysis, as the Permit required the Cities, i.e. "local agencies," to investigate and report on technical factors involved with water quality. Section 13225(c) provides that each regional board, with respect to its region, shall:

> (c) Require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom. (Emph. added.)[15]

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[15] *See* also § 13165, imposing this same requirement on the State Board when it requires a "local agency" to "investigate and report on any technical factors involved in water quality control". Section 13165 confirms the legislature's intent for both the State and Regional Boards to conduct a cost/benefit analysis before imposing monitoring and reporting obligations on municipalities.

Thus, both sections 13267 and 13225(c) imposed a clear statutory duty on Respondent to conduct a cost/benefit assessment before imposing and monitoring and reporting program upon the Cities.

The Permit's monitoring and reporting requirements are extensive. (30 AA 7835-7854.) Part 6.A.4 of the Permit requires the Permittees to comply with the "Monitoring and Reporting Program," (attached to the Permit at pages T-1 through T-20) "in the same manner as with the rest of the requirements in the permit." (18 AA 4751.) Section 1 of the Monitoring and Reporting Program, entitled "Program Reporting Requirements" requires:

> Each Permittee shall submit an Individual Annual Report to the Principal Permittee, by the date determined by the Principal Permittee, to be included in the Unified Annual Report. . . . Specific requirements that must be addressed in Annual Reports are listed below. (30 AA 7836.)

Section B of the Monitoring and Reporting Program sets forth a detailed description of what is to be included in the Individual Annual Reports. There is no indication, however, anywhere in the Permit or in the administrative record, that a cost/benefit analysis, as required by sections 13225(c) and 13267(b), was ever conducted, to consider the costs versus the benefits of the Individual Annual Reports. Nor is there any evidence Respondent prepared the requisite "written explanation" of the need for the reports or identified the evidence that supports requiring the reports. (§ 13267(b).)

Additionally, the " Trash Monitoring" section of the Monitoring and Reporting Program required by the Permit, provides:

> 1. The Principle Permittee and Permittees in Los Angeles River and Ballona Creek WMAs (listed in Permit Attachment A) **shall develop and implement a trash monitoring program for the Los Angeles River and Ballona Creek Watersheds no later than October 15, 2002.** The **monitoring program** and schedule shall be consistent with and pursuant to CWC § 13267 "Request for Trash Monitoring," issued by the Regional Board on December 21,2001. For the first two years of monitoring, either of the following formats for monitoring plans may be used:
>
> . . .
>
> 2. Permittees shall **report data** in a single unit of measure that is reproducible and measures the amount of trash, irrespective of water content, (e.g., compacted volume based on a standardized compaction rate, or dry weight). Permittees rnust select the unit, but all Permittees rnust use the same unit of measure.
>
> 3. Following the first two years of data collection, **Permittees shall conduct compliance monitoring,** which involves calculating trash loading as a running three-year average (estimated total load discharge from 2003-2006, divided by three). (30 AA 7846-47; emphasis added).

The Permit's express terms thus require substantial and detailed reporting and monitoring of trash for those Permittees that are within the Los Angeles River and Ballona Creek WMAs, yet, there is no evidence Respondent ever analyzed the relationship between the costs and benefits of the trash monitoring and technical reporting requirements mandated by the Permit. To the contrary, the evidence shows Respondent did not conduct a cost/benefit analysis, as they repeatedly asserted no such

cost/benefit analysis was necessary. (See, *e.g.,* R7950, "***We are, in fact, not legally required to do a cost/benefit analysis.")*** Moreover, the only evidence before the Regional Board on the monitoring and reporting mandates in the Permit, pointed to defects in the monitoring and reporting program, and the lack of any benefit of these requirements.

> Mr. Alvarez: . . .The last issue I would like to address is the monitoring requirement section. Monitoring requirements of the permit will not collect the information that will assist you or us in determining the effectiveness of the storm water permit.
>
> . . .
>
> These are costly data collection efforts that should be replaced with better targeted monitoring programs. This section also imposes monitoring programs to the Permittees which parallel those required to track the TMDL and to avoid duplication of effort and reasonable expenditures. We suggest such language be removed. (R4212-13, Testimony of Desi Alvarez, Director of Public Works, City of Downey.)

In addition, none of the "evidence" cited by the trial court supports the contention that any kind of cost/benefit analysis was conducted. In fact, the majority of the documents cited to support the court's finding ***do not even mention the costs of the program,*** let alone demonstrate Respondent conducted a cost-benefit analysis of the challenged programs, as required under the PCA. For example, the trial court cited R1291, R1541, R1988, R1999, R2776, R2882, and R6611 as evidence

"documenting Regional Board meetings." (37 AA 9770.) But an examination of these documents (which consist of meeting agendas) reveals that not one of these meetings was devoted to discussing the program's costs and benefits. (See R1291, R1541, R1988, R1998, R2776, R2882, R6611.) Likewise, the pages of the Fact Sheet cited to by the trial court do not contain a single word about costs. (R8078, R8080.)

Moreover, there is no evidence that the ***"written explanation with regard to the need for these reports"*** was ever provided to the Cities. (§ 13267(b)(1).) Instead, Respondent explicitly rejected the concept of conducting a cost/benefit analysis. (R7950, "We are, in fact, not legally required to do a cost benefit analysis.")

Further evidence of the Respondent's refusal to conduct a cost/benefit analysis, is the lack of a single finding that such an analysis was conducted. It is well-settled that the lack of required findings in support of an administrative action is a prejudicial abuse of discretion, requiring issuance of a writ of mandate. *(See, e.g., Topanga, supra,* 11 Cal.3d 506, 514-17 [agency must make findings supporting administrative action]; *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 779 [same]; *Usher v. County of Monterey* (1998) 65 Cal.App.4th 210, 220) [failure to make findings requires reversal and remand to agency]; *Respers* v. *University of Cal. Retirement System* (1985) 171

Cal.App.3d 864, 873; *Eureka Teachers Assn. v. Board of Education* (1988) 199 Cal.App.3d 353,368 [same].)

Finally, the trial court rejected the need for a cost/benefit analysis, by finding that "for those Petitioners who were part of a joint ROWD submission, the doctrines of estoppel and waiver applied." (37 AA 9769.) The trial court made this determination in spite of repeated and clear objections to the Permit, prior to its adoption, that a cost/benefit analysis was required. (See, e.g., R2130, R4760, and R6533.)

Furthermore, the trial court made this determination in spite of the fact that the ROWD submission referenced by the Court was prepared and submitted by the County of Los Angeles, not the Cities. (R1-2.) Although the ROWD was submitted by the County on behalf of all of the cities in the Permit, the document was not prepared or signed by the Cities. *(Id.)* In addition, neither BILD nor CICWQ were parties to the ROWD submission, and thus, there can be no argument that these Petitioners are somehow estopped or that they waived their right to assert that the Respondent failed to conduct a cost/benefit analysis, as required by law.[16]

The trial court also failed to make a finding that any of the elements of estoppel or waiver have been met, or even what such elements

[16] This fact was recognized by the trial court, as it found that estoppel and waiver applied only "for those Petitioners who were part of a joint ROWD submission." (AA 9747.)

were, much less explain why it was necessary to invoke estoppel against public agencies, to "avoid grave injustice." (37 AA 9769.) "In general, the four requisite elements for application of the doctrine of equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; ***(3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury."*** *(County of Sonoma, supra,* 231 Cal.App.3d 1289, 1295.) Further, ***estoppel will only be applied against a governmental body "in unusual instances when necessary to avoid grave injustice*** and when the result will not defeat a strong public policy." *(Hughes* v. *Board of Architectural Examiners* (1998) 17 Cal.4th 763,793.)

Here, the Regional Board cannot invoke the doctrine of estoppel against Petitioners both because 1) the Regional Board was not "ignorant of the true state of facts (i.e., the Petitioners' true positions with regard to the monitoring and reporting requirements), and 2) the Regional Board did not rely on the submission of the ROWD "to its detriment." *(County of Sonoma, supra,* 231 Cal.App.3d 1289, 1295.) If there was any confusion about Petitioners' endorsement of the terms of the ROWD, it was made clear to Respondent on numerous occasions, before the adoption of the Permit, both through oral objections made by Petitioners

and through written comments submitted on their behalf. (See e.g. R4212-13, July 26, 2001 Testimony of Desi Alvarez; R2130, May 15, 2001 Comments/Objections to Draft Permit; R4760, August 6, 2001 Comments/Objections to Draft Permit; and R6533, November 13, 2001 Comments/Objections.)

Thus, the Regional Board cannot claim it relied on a belief that Petitioners' supported the monitoring and reporting program when it adopted the Permit, much less show that it relied on such belief "to its injury." (County of *Sonoma,* supra, 231 Cal.App.3d 1289, 1295.)

Similarly the trial court's finding that "waiver appl[ies]" here is baseless. Waiver requires "a clear, unequivocal, and decisive act" by the waiving party demonstrating an "intentional relinquishment of a known right." (First *Nat'l* Bank, supra, 123 Cal. 360, 368; A. *J.* Industries, Inc. v. Ver *Halen* (1977) 75 Cal.App.3d 751, 759.) As discussed above, Appellants not only did not intentionally relinquish their right to challenge the monitoring and reporting program, they exercised it at every opportunity, objecting on numerous occasions before the adoption of the Permit, that a cost/benefit analysis was required. Thus, Appellants clearly did not waive their right to make such an objection. (A. J. Industries, Inc. v. Ver Halen, supra, 75 Cal.App. 3d, 751, 759.)

The trial court erred in refusing to issue the writ of mandate on the ground that Respondents failed to conduct a cost/benefit analysis as

compelled by State law, and in refusing to provide declaratory relief in this regard to interpret State law and bind future actions of the Respondent.

5. Numerous Permit Terms Violate Water Code Section 13360

Section 13360 prohibits a regional board from specifying the "design" or the "particular manner" by which a permittee must comply with WDRs or other orders of the regional or State Board. In this case, the trial court found again that State law need not be complied with, finding this prohibition was "inconsistent" with federal law. (37 AA 9776.)

On the one hand, the trial court wrongly found that "specific programs required under the Clean Water Act must take precedence over any statute within the Water Code," and that section 13360 would create an "inconsistency" with federal requirements, and thus that "federal requirements must take precedence over Water Code section 13360." (37 AA 9776.) On the other hand, the trial court expressly recognized that EPA regulations "should not set forth the specific requirements for permits because individual MS4 permit writers will determine the requirements adequate for their specific situations." (37 AA 97'75.)

Of course, both analyses cannot be correct, i.e. if the federal requirements do not set forth the specific requirements for an individual

MS4 Permit, then there are no "specific requirements" under the CWA which take precedence "over any statute within the Water Code." (Id. at 25 & 26.) Clearly here, federal law does not "forbid" the State from prohibiting a particular manner of compliance under section 13360, and Respondent was required to have complied with section 13360. (Burbank, supra, 35 Cal.4th 613, 626.)

Section 13360(a) provides as follows:

> **No waste discharge requirement or other order of a regional board or the state board** or decree of a court issued under this division **shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order,** or decree, and the persons so ordered shall be permitted to comply with the order in any lawful manner. (§ 13360(a), emph. added)

"Section 13360 says that the Water Board may not prescribe the manner in which compliance may be achieved with the discharge standard. That is to say, the ***Water Board may identify the disease and command that it be cured but not dictate the cure."*** (Tahoe-Sierra Preservation Council v. State Water Resources Control Board ("Tahoe-Sierra") (1989) 210 Cal.App.3d 1421, 1438, emph. added; see also 16 Op. Cal. Atty. Gen. 200, 2001 (1951) ***["a regional board may prescribe only the end result to be attained . . .It may not control the manner of achieving this result."]***

The purpose of the statute is thus to allow regulated parties to determine the most cost effective and efficient means of compliance based on their individual circumstances. (Id.) (Tahoe-Sierra, supra, 210 Cal.App.3d at 1438 "Section 13360 is a shield against unwarranted interference with the ingenuity of the parties subject to a waste discharge requirement. . . ***It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard.";*** (Tahoe-Sierra, supra, 210 Cal.App.3d 1421, 1438; emphasis added.) Therefore, a provision in a set of WDRs, such as the Permit in issue, that improperly dictates the method of compliance is invalid.

In the Matter of Petitions of the Cities of San Jose and Santa Clara, State Board Order No. WQ 80-6 (23 AA 6185), the State Board applied section 13360 to strike an overly prescriptive provision in an NPDES permit because it improperly directed the "manner of compliance" and intruded on matters of "local politics." (23 AA 6186.)

The State Board further found that:

> Water Code Section 13360 states that the Regional Board may not specify the manner in which a discharger must comply with the requirements, except under certain circumstances which are not present in this case. . . . **The discharge in this case is governed by an NPDES permit issued pursuant to the Clean Water Act (33 U.S.C. 466 *et seq*.) and the Water Code. We know**

> **of no federal regulation which might supersede the terms of the Water Code** and empower the Regional Board to require that a particular entity operate a facility subject to an NPDES permit. (Id. at *6-7; 23 **AA** 6186.)

(Also see State Board Order No. WQ 83-3, where the State Board struck down four of fourteen BMPs imposed by a Regional Board upon the United States Forest Service, that went "beyond the Regional Board's authority to limit discharges by requiring the USFS to comply with detailed prescriptions [which] clearly specif[ied] the manner of compliance." 23 **AA** 6189.)

The Permit in issue contains a number of provisions where Respondent improperly sought to dictate the cure, i.e., the specific manner of compliance. For purposes of this appeal, however, Petitioners challenge only two of these violations: (1) those provisions under Part 4.D which impose a particular "Numeric Design Criteria" on the Permittees, as the means of complying with the SUSMP requirements under the Permit (18 **AA** 4723-24); and (2) Part 4.F.5, which compels certain Cities to "place trash receptacles at all transit stops within [their] jurisdiction," and to thereafter maintain such trash receptacles (18 **AA** 4736).

First, Part 4.D.3, entitled "***Numeric*** Design Criteria," imposes a series of specific design criteria for a "Volumetric Treatment Control BMP," as well as specific design criteria for a "Flow Based Treatment Control BMP." (18 **AA** 4723-24.) Under Part 4.D.4 entitled

"Applicability of Numeric Design Criteria," the Permit then compels the Permittees to require builders and developers "to design and implement" only those post-construction treatment controls which meet the specified "Numeric Design Criteria." (18 AA 4724.)

Volumetric Treatment Control BMPs are to be designed to infiltrate, filter or treat stormwater runoff to address either "the 85th percentile 24-hour runoff event determined as the maximized capture stormwater volume for the area," or the "volume of annual runoff based on unit basin storage water quality volume to achieve 80 percent or more volume treatment," or the "the volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a stormwater conveyance system," or finally, the "volume of runoff produced from a historical-record based referenced 24-hour rainfall criterion for "treatment (0.75 inch average for the Los Angeles County area) that achieves approximately the same reduction in pollutant loads achieved by the 85th percentile 24-hour runoff event." (18 AA 4723-24.)

Similarly, any Flow Based Treatment Control BMP must meet specific design criteria, i.e., to address "the flow of runoff produced from a rain event equal to at least 0.2 inches per hour intensity;" or "the flow of runoff produced from a rain event equal to at least two times the 85th percentile hourly rainfall intensity for Los Angeles County" or "the flow

of runoff . . . treated using the volumetric standards above." (18 AA 4724.)

In all cases, the specific "Numeric Design Criteria" imposed for either a "Volumetric Treatment Control Board," or a "Flow Based Treatment Control BMP," are required as a post-construction treatment control for each of the Planning Priority Projects described in the Permit in Part 4.D.4. Accordingly, Respondent has imposed a waste discharge requirement specifying the "design, location, type of construction or particular manner in which compliance may be had" by requiring compliance with "Numeric Design Criteria." (§ 13360.) Moreover, nothing under federal law requires such specificity. The trial court erred in failing to find that the very specific Numeric Design Criteria imposed upon the Permittees was not contrary to section 13360.

A second violation of section 13360 exists in Part 4.F.5.c.3, where Respondent compelled those Permittees that are not subject to a trash TMDL, to "place trash receptacles at all transit stops within [their] jurisdiction," and required that all such trash receptacles be "maintained as necessary." (18 AA 4'736.) Again, nothing under federal law requires such specificity, and Respondent has not only identified the disease of trash, but has specifically dictated the cure, i.e., placing and maintaining trash receptacles "at all transit stops."

A writ of mandate should have issued, and the trial court erred in finding that section 13360 was preempted by federal law.

D. Respondent Admittedly Failed to Comply with CEQA when Issuing the Subject Permit

In the proceeding below, the trial court wrongly concluded that "the issuance of the subject permit was exempt from ***all aspects*** of ***CEQA."*** (37 AA 9739.) In doing so, the court ignored the plain language of section 13389, and its limited application as an exemption only from Chapter **3** of CEQA. The court also improperly found that complying with the policy requirements in Chapters 1 and 2.6 of CEQA would render the exemption illusory, finding that the adoption of the Permit in accordance with CEQA would somehow be inconsistent with federal law. (37 AA 9740.) Yet, nothing in federal law in anyway prevented Respondent from complying with its statutory obligations under CEQA, and its failure to assess the potentially significant adverse environmental impacts created by the subject Permit was an abuse of discretion.

CEQA requires all levels of California government to identify and analyze the effects of projects on the environment, and to minimize potential adverse effects through feasible mitigation measures or the selection of feasible alternatives. (Sierra Club v. State *Bd.* of Forestry ("Sierra Club") (1994) 7 Cal.4th 1215, 1233.) CEQA contains a "substantive mandate" that public agencies refrain from approving

projects with significant environmental effects if "there are feasible alternatives or mitigation measures available which would substantially lessen" or avoid those effects. (Mountain Lion Foundation v. Fish & Game Com. ("Mountain Lion") (1997) 16 Cal.4th 105, 134; also see *Arcadia* v. State Board, supra, 2006 DJDAR 1145, 1152.)

Section 13389 provides that "[n]either the state board nor the regional boards shall be required to comply with the provisions of ***Chapter 3*** (commencing with Section 21100) of Division 13 of the Public Resources Code (Chapter 3 of CEQA) prior to the adoption of any waste discharge requirement." By its own express terms, this exemption only exempts a regional board from complying with Chapter 3 of CEQA, i.e., from preparing a formal Environmental Impact Report prior to adopting WDRs. Moreover, the State Board's own regulations specify that section 13389 ***"does not apply to the policy provisions of Chapter 1 of CEQA."*** (23 CCR § 3733 (emph. added).)

State Board decisions further confirm that section 13389 is a limited exemption. For example, in In the Matter of the Petition of Robert and *Federick Kirtlan*, State Board Order No. WQ75-8, (18 AA 4782), the State Board found the Regional Board was subject to the policy provisions of CEQA in spite of section 13389, and, that it was required to have complied ***with Chapters 1 and 2.6 of CEQA.*** (18 AA 4784.) Similarly, in In the Matter of the Petition of the Sierra Club, *San Diego* Chapter,

State Board Order No. WQ84-7 (18 AA 4792), the Board concluded that ***"Section 13389 does not exempt Regional Boards from the policy provisions of CEQA (PRC $21000 – 21100)***." (18 AA 4797.)

In addition, in the Permit itself, Respondent recognizes it is not exempt from all parts of CEQA, as it specifically provides that its terms are exempt from "Chapter 3 of CEQA." (See 18 AA 4702, Permit Finding G(6).)

Thus, it is clear that the exemption under section 13389 is limited, and that Respondent was not exempt from complying with "all aspects of CEQA" when adopting the Permit. (See also Sierra Club, supra, 7 Cal.4th 1215, 1233 [project proponent had substantive obligation to identify and mitigate the significant impacts of the proposed project, despite exemption from Chapters 3 and 4 of CEQA]; Environmental Protection Info. Ctr., *Inc.* v. Johnson (1985) 170 Cal.App.3d 604, 624-25 [cumulative environmental impacts for a timber harvest plan had to be evaluated despite a partial exemption from Chapters 3 and 4 of CEQA].)

As the primary purpose of CEQA is to afford the fullest possible protection to the environment within the reasonable scope of the statutory language (see No Oil, *Inc.* v. *Los Angeles* (1974) 13 Cal.3d 68, 83), the Legislature established a "substantive mandate" requiring that all public agencies consider the environmental consequences of a proposed project, including permitting actions, and to explore feasible alternatives and

mitigation measures prior to the approval of any such project. (PRC 21002; also see Mountain Lion, supra, 16 Cal.4th 105, 134.)

In addition, under section 13372(a), section 13389 (a part of Chapter 5.5 of the PCA) "only applies to actions ***required under*** the Federal Water Pollution Control Act. . . ." (Water Code § 13372(a).) Therefore, section 13389 exempts Respondent from compliance with Chapter 3 of CEQA only to the extent its actions are "required" by the CWA. (§§ 13372(a) and 13389.) As discussed at length above, the CWA does not "require" that the Cities strictly comply with state water quality standards, or to impose specific "Numeric Design Criteria" on Appellants. As a result, at a minimum, Respondent was required to have performed an environmental analysis of the adverse impacts to the environment from requiring compliance with Parts 2, 3.C and 4.D of the Permit.

In Arcadia v. State Board, supra, 2006 DJDAR 1145, the Fourth District Court of Appeal invalidated a Trash TMDL for the Los Angeles River, on the grounds the Respondent State and Regional Boards' CEQA documentation was "inadequate," finding that a tiered "EIR," or "functional equivalent" was required. (Id. at 1154.) The Arcadia Court discussed the impacts that may result from the construction of certain pollution control devices the TMDL required to be installed – devices not dissimilar from the post construction SUSMP devices to be installed under the subject Permit – and found that:

> The Trash TMDL estimates the cost of installing low capacity VSS [vortex separation systems] units would be $945 million and the cost of installing large capacity VSS units would be $332 million.
>
> The checklist and the Trash TMDL, however, ignore the temporary impacts of the construction of these pollution controls, which logically may result in soils disruptions and displacements, an increase in noise levels and changes in traffic circulation . . . The checklist and the Trash TMDL also ignore the effects of increased street sweeping on air quality, and possible impacts caused by maintenance of catch basin inserts, VSS units and other compliance methods.) *(Id.)*

In the present case, the Trash TMDL (which is specifically referenced in the subject Permit, 18 AA 4697, is one of the TMDLs to be incorporated into the Permit pursuant to Part 3.C, and is thus one of the water quality standards which must be strictly complied with under Part 2 of the Permit.[17]

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[17] Finding E. 8 of the Permit provides, in part, as follows:

> "A TMDL specifies the maximum amount of a pollutant that a water-body can receive can receive, ***still meet applicable water quality standards*** and protect beneficial uses . . . . This permit incorporates a provision to implement and enforce approved load allocations for municipal storm water discharges and requires amending the SQMP after pollutants loads have been allocated and approved." (Emphasis added.)

The cost of installing pollution control devices as needed to strictly comply with water standards, is estimated in the Caltrans study as ***more than $50 billion.*** (R 6089.) The installation of these treatment systems and units throughout the County, will obviously have potentially significant adverse impacts on the environment, as will the installation of the treatment control devices to meet the SUSMP requirements. (See *Arcadia v. State Board, supra,* 2006 *DJ* DAR 1145, 1154.)

In *Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1981) 192 Cal.App.3d 847, the plaintiff brought suit arguing respondents had failed to comply with CEQA in establishing WDRs for the operation of a municipal sewage treatment facility. The Court sustained the trial court's denial of the writ of mandate on the grounds that CEQA had been complied with. However, in response to the City's argument that section 13389 exempted the project from CEQA compliance, the Court rejected the argument and held:

> The flaw in this argument, as plaintiff correctly notes, is that both the cities and the Pacific Water court ignore the limitation placed upon this exemption by Water Code *section* 133*72*. **This section provides that the "provisions of this chapter [which includes section 13389] shall apply only to actions required under the Federal Water Pollution Control Act, as amended."** The challenged orders here were issued under the exclusive authority of the Porter-Cologne Act and were not required by the Federal Water Pollution Control Act. The cities do not

> contend otherwise. By terms of the statutes read as a whole, *the exemption under Water Code section 13389 simply does not apply in this case, a point conceded by the boards. (Id*. at 862 [italics in original, bold face added].)

Finally, there is no evidence Respondent made any attempt to comply with any aspect of CEQA whatsoever. In fact, Respondent asserts the opposite, that it did not need to comply with CEQA. (R68813, Response to Comments 32 & 34, "[t]he requirements under an NPDES permit are exempt from review under CEQA." (R68813).)

The trial court clearly erred in holding that "the issuance of the subject permit was exempt from all aspects of CEQA." (Phase I SOD, p. 10.)

E. Respondent Exceeded Its Authority By Adopting Permit Terms that are Contrary to and Conflict with the Requirements of CEQA

Respondent not only violated CEQA by failing to conduct an environmental review of the potential impacts created by the project, i.e., the adoption of the subject NPDES Permit, it also adopted Permit terms which directly conflict with the existing requirements of CEQA. In doing so, it adopted a Permit which infringed on the rights provided to BILD, CICWQ and the Cities, under CEQA. That is, Respondent, an agency that is a part of the executive branch of government, adopted a "permit" that conflicts with the CEQA process the Cities are required to follow in processing development projects. The Permit expressly limits the rights

of developers, such as BILD and CICWQ members, to have their projects reviewed and approved as provided for under CEQA. In short, Respondent has sought to change the environmental review process adopted by the California Legislature.

The trial court improperly ignored the obvious conflicts between CEQA and the process imposed by the Permit, finding that the Legislature intended CEQA to be "an environmental review process, not the only one." (37 AA 9741 [emphasis in original].) But the process set forth in the Permit is not a separate environmental process that merely parallels CEQA. Rather, the Permit attempts to co-opt the CEQA process for its own purposes, and imposes terms which are inconsistent with those of CEQA.

The California Constitution clearly mandates a separation of powers between the legislative, executive, and judicial branches of State government in Article 3, § 3:

> "the powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

In turn, Article 4, § 1 of the Constitution vests all legislative power of the State in the California Legislature, except to the extent the "people reserve to themselves the powers of initiative and referendum." (Cal. Const. Art. 4, § 1.) Thus, only the Legislature may "declare a policy and

fix the primary standard." (*Knudsen* Creamery Co. of California *v. Brock* (1951) 37 Cal.2d 485, 492.) The Legislature may appoint an "authorized administrative or ministerial officer [to] 'fill up the details' by prescribing administrative rules and regulations," but that officer 'may not 'vary or enlarge the terms or conditions of the legislative enactment'" or "'compel that to be done which lies without the scope of the statute.'" (Id. at 493.)

CEQA establishes a clear procedure to be followed to "control environmental pollution" (PRC § 21000(f)) and to establish "***feasible*** mitigation measures" or "***feasible*** alternatives" to projects affecting the environment. (PRC § 21002.) The term "feasible" is defined to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technologicalfactors." (PRC § 21061.1(emph. added).)

CEQA expressly allows a local agency to consider these and other factors, including factors that may override the potential adverse impacts on the environment, thus permitting the approval of even those projects with unmitigated environmental impacts. (See PRC § 21081(b)), [Agency may approve projects, even where significant effects from the project will go unmitigated, where the Agency "finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."].)

The Legislature has thus dictated the procedure local agencies are to follow in conducting an environmental review of development "projects," and in imposing mitigation measures on such "projects," and the Respondent was without jurisdiction to modify this procedure.[18]

In addition, the Legislature has identified, through statute and regulation, various statutory and categorical exemptions to CEQA. For example, CEQA applies only to "discretionary" projects. "Ministerial" projects are expressly exempt from CEQA's application, i.e., public agencies have no authority to review ministerial projects for purposes of imposing additional mitigation measures beyond those already included in the codified standard. (See Pub. Res. Code § 21080(b)(1).) The exemption of all "ministerial" projects from the application of CEQA (and thus from review for purposes of imposing additional mitigation measures under CEQA) is significant in connection with the Permit, as the Permit seeks to impose mitigation measures on all "***projects***," whether

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[18] Respondent, as a regional water quality control board, is a body of limited jurisdiction having no general jurisdiction and only "such power as has been conferred on it by the Constitution or by statute." (Brooks v. State Personnel Bd. (1990) 222 Cal.App.3d 1068, 1074; see also, *Weber* v. Board of Retirement (1998) 62 Cal.App.4th 1440, 1446.) The Respondent's authority is thus confined to "water quality" control as expressly limited by sections 13225 and 13263. (See, e.g., 48 Op. Cal.Atty.Gen. 85, 88 (1966) [finding that where the Board has acted beyond its conferred powers, its actions are void].)

"discretionary" or "ministerial."[19]

Parts 4.D.4 and 4.D.7 of the Permit provide:

> 4. Applicability of Numeric Design Criteria.
>
> **The Permittees shall require the following categories of Planning Priority Projects to design and implement post-construction treatment control to mitigate storm water pollution: . . ..**
>
> a) Single-family hillside residential developments of one acre or more surface area;
>
> b) Housing developments (includes single family homes, multifamily homes, condominiums and apartments) of ten units or more;
>
> c) A 100,000 square feet or more impervious surface area industrial/commercial development;
>
> d) Automotive service facilities . . . [5,000 square feet or more of surface area];
>
> e) Retail gasoline outlets [5,000 square feet or more of impervious surface area . . .];
>
> f) Restaurants (SIC 5812) [5,000 square feet or more of surface area];

[19] Moreover, the Permit requires SUSMPs for numerous other "projects" which are categorically exempt from CEQA. (See, e.g., 14 CCR 15302 [related to replacement or reconstruction of existing structures or facilities]; *see also* 14 CCR 15303, 14 CCR 15304, 14 CCR 15311; and other exemptions under 14 CCR 15315.)

> g) Parking lots 5,000 square feet or more of surface area or with 25 or more parking spaces;
>
> h) Projects located in, adjacent to or discharging directly to an ESA that meet threshold conditions identified above in 2.e; and
>
> i) Redevelopment projects in subject categories that meet Redevelopment thresholds. (18 AA 4724-4725.)
>
> * * *
>
> 7. Redevelopment Projects
>
> **The Permitee shall apply the SUSMP,** or site-specific requirements including post-construction storm water mitigation **to all Planning Priority Projects that undergo significant Redevelopment** in their respective categories. (18 AA 4725 (emph. added).)

For each of the eight specified residential, commercial and industrial development projects, a "SUSMP," i.e., an environmental mitigation measure, is being imposed, without Respondent first conducting an initial study, as required by the Guidelines to CEQA (14 CCR § 15063) to determine the potentially significant adverse impacts of an individual project, and without the Respondent allowing project applicants the flexibility to propose other mitigation measures to address any potentially significant adverse impacts on storm water from such project (PRC 21002), or allowing BILD or CICWQ members, for example, to develop their own set of feasible alternatives. *(Id.)*

The Permit thus directly conflicts with the CEQA process, by imposing project applicants, such as BILD and CICWQ members, a specific storm water mitigation measure, i.e., the Numeric Design Criteria for SUSMPs, to the exclusion of other alternative mitigation measures for storm water or feasible project alternatives. (18 AA 4723-25.) Likewise, the Permit requires that this specific SUSMP mitigation measure be imposed even for many "projects" that would otherwise be exempt from CEQA, for example, because the Permittees approval of them is "ministerial" in nature.[20]

Clearly, Respondent is attempting to change the process mandated by the California Legislature, and in so doing, ignores vested rights. In particular, requiring Appellants BILD and CICWQ to design and construct the particular Numeric Design SUSMP Criteria, without allowing them to develop other alternative mitigation measures, or feasible alternatives, as permitted by CEQA, contradicts their rights under CEQA. Similarly, prohibiting a City from approving a project that does not contain a SUSMP, even with a finding of overriding considerations,

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[20] In Permit Finding F(1), on page 13, Respondent recognizes that CEQA requires public agencies to consider the environmental impacts of projects that they approve for development, and that CEQA exempts ***"ministerial projects"*** from its application, and makes the following faulty unsupported finding: "A ministerial project may be made discretionary by adopting local ordinance provisions or imposing conditions to create decision-making discretion in approving the project. In the alternative, Permittees may establish standards and objective criteria administratively for stormwater mitigation for ministerial projects." (18 AA 4700.)

eviscerates the authority provided to Cities under CEQA to approve projects even with unmitigated storm water impacts on the environment. (PRC § 21081(b).)

With the adoption of CEQA, the State Legislature has "occupied the field" on the process to follow in imposing environmental mitigation measures on development projects. Thus, any action by a regional board to adopt provisions which contradict CEQA is an abuse of discretion. (See, *e.g.,* Leslie v. Superior Court, (1999) 73 Cal.App.4th 1042, 1052 ["By enacting the Uniform Statewide Building law and mandating that local government adopt the UBC and the CBSC, the Legislature has shown its intent to preempt local governments from legislating on the subject, except as narrowly permitted under Health and Safety Code Section 17958.5."].)[21] The trial court erred in failing to issue a writ of mandate on this ground.

The trial court also improperly held that the doctrines of estoppel, laches and waiver prevented the Petitioners from challenging the SUSMPs. (37 AA 9779, 9741.) Yet, those Appellants who are most

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[21] Further evidence of Respondent's attempt to regulate in an area where it has no authority to do so, and where the State Legislature has already "occupied the field," is the area of Environmentally Sensitive Areas, ("ESAs"). (Permit Part 4.D.4(h), 18 AA 4727.) ESAs and development therein is already expressly subject to significant regulation under other state and federal laws. (See California Coastal Act, PRC § 13000 et seq., and § 30000 et seq.; California Endangered Species Act, Fish and Game Code § 2050 et seq.; CEQA, PRC § 21000 et seq.; and the Federal Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.)

impacted by having to comply with the SUSMP provisions in the Permit, i.e. BILD and CICWQ (whose members will have to design, install and maintain the SUSMPs required by Part 4.D), were not a part of the ROWD process, and obviously cannot be barred by estoppel, laches or waiver from challenging the SUSMP provisions. In fact, even the trial court recognized this reality, holding that such doctrines were applicable only to "those Petitioners who were part of the joint ROWD submission. (37 AA 9779.)

Moreover, the trial court clearly erred in concluding (without making a single finding regarding the existence of any element of estoppel, laches or waiver) that even the municipal Petitioners' claims were barred by the 1996 ROWD submission. Pursuant to the PCA, Petitioners have a right to challenge any new action or failure to act by a regional board. (§§ 13320, 13330.) Under section 13330(b):

> Any party aggrieved by a final decision or order of a regional board for which the state board denies review may obtain review of the decision or order of the regional board in the superior court by filing in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review. (§ 13330(b).)

Thus, Petitioners cannot be barred from challenging a provision in the 2001 Permit, simply because they did not challenge an earlier order or permit of the Respondent, which has long since expired. To the contrary, "any party aggrieved by a final decision or order of a regional board" has

a statutory right to challenge such decision, whether or not it is consistent or inconsistent with any prior order or decision that may have been issued. *(Id.)* Further, a review of the 1996 Permit shows that in fact the SUSMP provisions were not even a part of the 1996 Permit [R 28657-28726], but were adopted after the 1996 Permit by a separate determination of Respondent, which Permit and requirements have both since expired.

Furthermore, none of the elements of estoppel, waiver, or laches are met in this case. The Petitioners objected to the SUSMP and CEQA review provisions in the Permit on numerous occasions before the adoption of the Permit. (May 15, 2001 Comments/Objections to Draft Permit, R2124-29, R2136-37; August 6, 2001 Comments/Objections, R4746-57; November 13, 2001 Comments/Objections, R6523-32.) Therefore, the Petitioners cannot be estopped from challenging such provisions because the Regional Board was clearly not "ignorant of the true state of facts (i.e., the Petitioners' true positions with regard to such provisions), and thus could not possibly have relied on any proposed permit terms from the ROWD "to its injury." *(See County of Sonoma, supra,* 231 Cal.App.3d 1289, 1295.) Further, again, the ROWD was prepared and submitted by the County, not the Appellants herein. (Rl-2.)

Likewise, since Appellants objected to the SUSMP provisions on numerous occasions before the Permit was adopted, they clearly did not "intentional[ly] relinquish[]" their right to challenge the SUSMP such

provisions, and waiver does not apply. (First *Nat'l* Bank, supra, 123 Cal. 360, 368.) Nor did Appellants have the right to waive the requirements of CEQA, which was enacted not to protect Appellants' interests, but to protect the interest of the public in protecting the environment. (Civil Code § 3513; Covino v. Governing Board (1977) 76 Cal. App. 3d 314, 322 ["a law established for a public reason cannot be waived or circumvented by a private act or agreement"].)

Similarly, laches clearly does not apply here. "The elements of laches are (1) the failure to assert a right, (2) for some appreciable period so as to amount to unreasonable delay, (3) which results in prejudice to the adverse party." (In re Marriage of Powers (1990) 218 Cal.App.3d 626, 642.) Here there was no delay, let alone "unreasonable delay" by the Appellants. As discussed above, Petitioners asserted their objections to the SUSMP provisions, and specifically the proposed permit terms that required permittees to amend their CEQA review processes at every opportunity, before the adoption of the Permit. (See R2124-29; R2136-37; R4746-4757; R6523-6532.) Further, there has been no defense raised by Respondent that these Appellants did not file their Complaint within the 30 days provided by statute. (§ 13330(b).)

Thus, the trial court erred in finding that estoppel, waiver, and laches applied to this case, and in finding Respondent did not abuse its

discretion when it acted outside of its jurisdiction in adopting Permit terms that directly conflict with CEQA.

F. Respondent Exceeded Its Authority When It Sought To Modify The Permittees' General Plan Process.

Under Part **4.D.12** of the Permit, entitled "General Plan Update," Respondent has required that the Cities amend, revise or update certain elements of their General Plans. **(18** AA **4728.)** In so doing, Respondent has gone beyond simply "filling in the details" and instead has impermissibly attempted to amend state law governing General Plans, infringing on the cities' sovereignty and in violation of the separation of powers doctrine. **(See** Govt. Code §§ 65300, 65300.9; *Yost* v. *Thomas* (1984) 36 Cal.3d 561, 573.)

Appellants herein incorporate, in its entirety, the *City* of *Industry et al* Appellants' brief on this significant issue, and submit the trial court erred in not issuing a writ of mandate on this ground.

G. Respondent Exceeded Its Authority and Acted Arbitrarily In Adopting Permit Terms that are Contrary to the Federal Clean Water Act

1. The Permit is Arbitrary, Capricious, and in Violation of Law, as it Requires Controls that Go Beyond the CWA and MEP Standard and Is Impossible to Comply With

As discussed above in connection with the discussion of the violations of State law, the trial court erroneously found in the SOD-I that "the Regional Board acted within its authority when it included Parts **2.1**

and 2.2 in the Perrnit without a 'safe harbor,' whether or not compliance therewith requires effluents that exceed the 'MEP' standard." (37 AA 9736.) This issue "concerning the proper scope of a regulatory agency's authority – presents a purely legal issue, and is not dependent on the court's factual findings regarding the practicality of a specific regulatory controls identified in the Permit." (*BIA,* supra, 124 Cal.App.4th 866, 881.)

Although the *BIA* Court concluded in that case that Congress intended the CWA to provide the Regional Board with the authority "to impose standards stricter than a 'maximum extent practicable' standard, this Court is not bound by the decisions of a different appellate district, and there are no decisions on this issue by the Second District Court of Appeal or the California Supreme Court. For the reasons set forth below, and as described in the County of Los Angeles's Brief, the trial court erred in holding that the Respondent had the authority to impose compliance with state water quality standards without a "safe harbor" and whether or not compliance therewith "requires efforts that exceed the 'MEP' standard." (37 AA 9736.)

Recognizing that municipal storrnwater is different than other discharges, and that municipal permittees are different from other NPDES permittees, Congress specifically created a separate statutory scheme to govern municipal stormwater discharges, which statute explicitly

distinguishes between industrial stormwater discharges and municipal discharges. With regard to municipal discharges, the plain language of the CWA sets the MEP standard as the upper limit on the requirements that a MS4 permit may contain. (33 U.S.C. § 1342(p)(3)(B)(iii) ["Permits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the ***maximum extent practicable"];*** Browner, 191 F.3d at 1165 ["Congress expressly required ***industrial*** stormwater dischargers to comply with the requirements of 33 U.S.C. § 1311 . . . ***Congress chose not to include a similar provision for municipal storm-sewer discharges.")***

There is a good reason Congress chose not to impose as stringent of standards upon municipalities as on industrial dischargers – municipalities neither cause, nor control, stormwater runoff. Therefore, it is not reasonable to interpret federal law as permitting the State and/or EPA to impose permit terms on municipalities that are not limited by the upper MEP standard, e.g., terms that require strict compliance with State Water Quality Standards. For this reason, the trial court erred in failing to find that the MEP standard is the upper substantive limit on the State when imposing NPDES Permit terms on municipalities, and in refusing to invalidate Parts 2 and 3.C of the Permit, which require strict compliance with water quality standards.

Moreover, it is impossible for Permittees to strictly comply with Part 2 of the Permit; they would be in violation of Parts 2.1 and 2.2 of the Permit from its effective date, because some of the waterways considered part of the MS4 system (such as the Los Angeles River and Ballona Creek), have already been designated by the Regional Board as "impaired water bodies" under CWA Section 303(d), i.e. as water bodies which have not achieved compliance with water quality standards. (See 33 U.S.C. § 1313(d)(1)(A).

Parts 2.1 and 2.2 thus effectively impose a ***zero discharge requirement*** with regard to all pollutants that would contribute to an exceedance of a water quality standard in such water bodies. Since the Permittees have no choice but to discharge stormwater into such water bodies, and cannot reasonably reduce the pollutants in such discharges to zero, it is impossible for them to strictly comply with Parts 2.1 and 2.2. The Court must presume that in enacting the CWA Congress did not intend to require permittees to achieve the impossible. (See *Hughey* v. *JMS* Development *Corp.* (11th Cir. 1996) 78 F.3d 1523, 1529-30.) Thus, the trial court erred in refusing to issue a writ invalidating Part 2 and 3.C of the Permit, and in refusing to issue declaratory relief in this regard.

Appellants herein incorporate the County et *al.* Appellants' brief on the above issues involving the MEP standard and impossibility.

2. Respondent Acted Contrary to Law As It Sought To Regulate Discharges "In" or "To" the Municipal Storm Sewer System, Without Authority to Do So.

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

Likewise, CWA Section 1342(p)(3)(B), entitled "Municipal discharge," requires municipalities to obtain permits for stormwater "for discharges from municipal storm sewers." Section 1342(p)(3)(B) of the CWA provides that:

> **(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 . . . . (33 U.S.C. § 1342(p)(3)(b); emphasis added.)

Further, language throughout the CWA's implementing regulations reinforces the fact that MS4 Permits are to be permits to reduce the discharge of pollutants "***from***" the MS4. For example, 40 CFR section 122.26(a)(3) provides: "Permits must be obtained for all discharges from large municipal separate storm source systems." (emph. added). 40 CFR section 122.26(d), which concerns the application requirements for large and medium discharges, provides that such applications must be filed by "the operator of a discharge from a large municipal separate storm separate storm sewer or medium municipal separate storm sewer. . . ." (Emphasis added.) (See also 40 CFR §§ 122.26(d)(1)(v), 122.26(d)(2)(iv)(A); 122.26(d)(2)(iv)(A)(1-3 & *6)*, all imposing requirements on Cities to reduce the discharge of pollutants "***from***" the MS4.

These regulations and language in section 1342(p)(3)(B) of the Act are consistent with the overall purpose of the NPDES permit program – to prohibit the discharge of pollutants from a "point source" into navigable waters of the United States,[22] except under an NPDES permit. (See Browner, supra, 191 F.3d 1159, 1163 [citing § 1342(a)(1)]. As noted in that case, EPA initially treated storm water discharges as being exempt

[22] Obviously, municipal storm sewers are not "navigable waters of the United States."

from the requirements of the CWA, until the decision in Natural Resources Defense Inc. v. *Costle* (D.C. Cir. 1977) 568 F.2d 1369, which held that EPA did not have the authority "to exempt categories of point sources from the permit requirements of § 402 [33 U.S.C § 1342]."

Thereafter, in 1987, with the Water Quality Act Amendments to the CWA, Congress amended the Act to include the provisions described above, i.e., exempting discharges of storm water frorn the permit requirements of the Act for a period of time, except in regards to discharges ***from*** a municipal separate storm sewer system. (Browner, supra, 191 F. 3d 1159, 1163.)[23] Nowhere in the CWA or its regulations is there any authority provided to the EPA Administrator or to a state, to require "municipalities" to reduce the discharge of pollutants "in" or "to"

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[23] The State Board itself previously determined, in Order No. WQ 2001-15, that the Regional Board had no authority to regulate discharges "into" the MS4, reasoning:

> The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3(B) authorizes the issuance of permits for discharges "from municipal storm sewers." We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly true that in most instances it is more practical and effective to prevent and control pollution at its source. . . . Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions . . . (18 AA 4809-10.)

the MS4. The Permit thus unlawfully attempts to require the Cities to implement measures to reduce pollutants discharged "in" or "to" the MS4 system.

First, under Parts 3.A.2, 3.A.3 and 3.B, Respondent requires Permittees to "reduce the discharge of pollutants *in* storm water to the MEP," and to implement "BMPs" intended to result in the reduction of pollutants *"in* storm water to the MEP." (18 AA 4705.) Similarly, in 3.G.2.e, the Permit requires that the Permittees "[r]equire the use of BMPs to prevent or reduce the discharge of pollutants ***to*** MS4s to MEP." (18 AA 4709.) And the first paragraph of Part 4 of the Permit, entitled "Maximum Extent Standard," provides that the Permit is "intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the MEP from the permitted areas in the County of Los Angeles to the waters the State." (18 AA 4710; emphasis added.)

Finally, under Part 4.D entitled "Development Planning Program," the Permit requires the Permittees to control the discharge of pollutants from various development redevelopment projects that result in discharges *"in"* storm water, by requiring Permittees all Planning Priority Development and Redevelopment projects to "[p]rovide for appropriate

permanent measures to reduce storm water pollutant loads in storm water from the development site."(18 AA 4721, emphasis added.)

Although the CWA only authorizes permits to "reduce" the discharge of storm water pollutants "from" an MS4, the trial court erroneously held that the Respondent had the authority to require the reduction of storm water pollutants "in" or "to" the MS4 (37 AA 9745-9746), thus imposing the responsibility upon the Cities to reduce the discharge of pollutants running off of private property "in" or "to" their storm drain systems.

The trial court seemingly failed to focus on the issue of the Respondent's authority to regulate such discharges, but instead appeared to focus on whether or not reducing such discharges "in" or "to" the MS4 made sense in the court's view. For example, the trial court found that preventing discharges into the MS4 "probably is the cheapest method" of preventing discharges from the MS4 (37 AA 9745), that the "administrative record contains an admission by Petitioners that 'the most effective way of dealing with stormwater runoff is to deal with it at the source before it becomes a problem'" (37 AA 9745), and that "by regulating discharges into the storm drain system, Petitioners have the opportunity to try to deal with it at the source of the contamination." (37 AA 9746.)

In doing so, the trial court failed to recognize the fact that it is not the Cities who generate the pollutants in issue, and that the Cities have little, if any, control to reduce the discharge of pollutants before they enter the MS4. Further, whether or not the best way to reduce pollutants "from" the MS4, is to reduce this discharge "in" or "to" the MS4, is for Congress, not the trial court, to decide.

Moreover, in finding the Regional Board had authority to regulate discharges "in" or "to" the MS4, the trial court inappropriately relied on portions of the CWA and regulations which have no relevance to the issue. For example, Section 1342(p)(3)(B)(ii) of the CWA, which provides that Permits for discharges from municipal storm sewers "shall include a requirement to ***effectively prohibit non-stormwater*** discharges into the storm sewer," has nothing to do with whether the Regional Board can require the reduction of pollutants from ***stormwater*** discharges. (See 33 U.S.C. § 1342(p)(3)(B)(ii).) In fact, as clarified by the regulations, this section does not require the Permittees to implement a program to themselves reduce or eliminate stormwater discharges, but only requires that the Permittees regulate other dischargers, i.e., that they "prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer." (See 40 CFR § 122.26(d)(2)(i)(B).)

The trial court thus erred in refusing to issue the writ of mandate on this issue.

3. The Permit's Requirements for Permittees to Regulate Industrial Facilities and Construction Sites Are Arbitrary and Contrary to Law, and Respondent Exceeded its Jurisdiction

a. The Permit's Industrial and Commercial Facilities Inspection Requirements are Arbitrary, Capricious, and Contrary to Law

Parts 4.C.2.a, 4.C.2.b, 4.E.2.b, and 4.E.3 of the Permit require Permittees to inspect various commercial and industrial facilities, and construction sites. (18 AA 4716-18, 4730-31.) These requirements go well beyond the type of inspection programs the federal regulations require of municipalities in inspecting for illicit non-storm water discharges. (See 40 CFR § 122.26(d)(2)(iv).) Further, the Permit wrongly attempts to shift these inspection responsibilities, which the State Board has specifically delegated to the Regional Board, onto the Permittees. (See General Industrial Activities and General Construction Activities Permits, 23 AA 6077-6143 and 6144-84.) Thus, the trial court erred in failing to issue a writ of mandate ordering the Regional Board to set aside Parts 4.C.2.a, 4.C.2.b, 4.E.2.b, and 4.E.3 of the Permit. Appellants herein incorporate in its entirety the *County of Los Angeles et al* Appellants' brief on these issues.

b. The Permit's Development Construction Program Is Arbitrary, Capricious, and in Violation of Law

Part 4.E.1 of the Permit requires each Permittee to "implement a program to control runoff from construction sites within its jurisdiction" which, among other things, ensures the following minimum requirements: "a) ***Sediments shall be retained"*** using adequate treatment control or Structural BMPs;" and "b) Construction-related materials, wastes, spills, or residues ***shall be retained*** at the project site to avoid discharge to streets, drainage facilities, receiving waters, or adjacent properties by wind or runoff." (18 AA 4729, Permit Part 4.E.1(a)-(b).) Read literally, Part 4.E.1 reads as an ***absolute prohibition*** on the discharge of sediment and other "construction-related materials," presumably including sand, gravel, and other natural materials, from any construction site in the Permittees' jurisdictions. Moreover, the trial court's ruling against the Petitioners on this issue reinforces this interpretation. (37 AA 9790-9791.) "Sediment from construction is a major source of pollution in the storm sewer systems. . . . [Part 4.E.1] is clear and not ambiguous . . . 'construction related materials' does include sand, gravel or other natural materials."[24]

[24] The Court also found that the language of Part 4.E was similar to that contained in the Permittees' ROWD and thus that certain petitioners were estopped or had waived their rights in this regard. (AA 9768-69, SOD-II at 40-41.) Yet, because those Appellants who are most effected by Part

This prohibition, which appears to be a backhanded way of adopting a TMDL for sediment for all construction sites throughout the entire region (without regard for the requirements for adopting TMDLs under State and federal law), is overly broad, and is vague and arbitrary in that there is no evidence in the record to demonstrate that such a draconian standard of "zero" is necessary, practicable or feasible. Moreover, an apparent prohibition on the discharge of any sediment makes no allowance for naturally occurring baseline discharges from construction sites.

Obviously, natural undisturbed open space will cause a certain amount of sediment to be discharged to receiving waters under natural conditions. To require that construction sites discharge less sediment than undeveloped land, is patently arbitrary and unreasonable. And since it is impracticable to eliminate the discharge of all sediment and similar materials from constructions sites, the Permit's prohibition could have the effect of forcing a complete halt of all construction throughout the Permittees' jurisdictions. Such is not a "reasonable" requirement (§ 13263(a)), and is not designed to achieve a "water quality conditions

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4.E, i.e. BILD and CICWQ were not parties to the ROWD, that finding should have no effect on this Court's analysis of the issue. Moreover, for the same reasons discussed above in connection with the various other issues, the doctrines of estoppel and waive simply do not apply here, and the trial court made no findings showing that the Respondent has met its burden on any of these assertions.

that could reasonably be achieved." (§ 13241(c).) Nor is it possible, or consistent with the MEP standard. (33 U.S.C. § 1342(p)(3)(B)(iii).)

Moreover, genera1 operations at a construction facility are already subject to significant regulations pursuant to the General Construction Activities permit. (23 AA 6144-84.) Although the General Permit requires construction sites to implement "sediment control BMPs," it does not impose an absolute prohibition on the discharge of sediment and other construction-related materials (defined by the trial court to include "sediment"). (See 23 AA 6159-61.) An absolute prohibition on such discharges is thus contrary to the State's own General Construction Permit, and is arbitrary. As there is no evidence in the record to support any findings in this regard, and as there are no findings in the Permit to support such terms, Respondent has abused its discretion.

Furthermore, the Permit requires that Permittees impose upon the regulated community, for all construction sites of one acre and greater, a requirement to develop a Local Storm Water Pollution Prevent Plan ("Local SWPPP"), which is to be submitted prior to the issuance of a grading permit. The Local SWPPP is required to be at least as inclusive of the BMPs set forth in the State SWPPP, and must include ***additional provisions*** for selecting or rejecting BMPs, along with a statement signed by the project's architect or engineer of record or authorized designee that

the selected BMPs are effectively minimizing the negative impacts of the project's construction activities on storm water quality. (18 AA 4729-30.)

This Local SWPPP requirement is entirely unnecessary and arbitrary, because SWPPPs are already required to be developed and implemented for construction sites under the General Construction Permit. (23 AA 6147.) Thus, the only plausible reason to include such a provision in the subject Permit, would have been to transfer the responsibility to regulate construction sites (as set forth in the General Construction Permit) from the Respondent, on to the Permittees. Such a transfer of responsibility is not authorized or supported anywhere under State or federal law, and the Respondent has acted outside of its authority and abused its discretion in imposing such a requirement on the Permittees, and ultimately on BILD and CICWQ members.

The Local SWPPP requirement is unfair to the building industry (in this case, Appellants BILD and CICWQ) because it unnecessarily subjects them to double regulation—they must prepare and submits SWPPPs to both the Regional Board and to the municipalities for the same construction sites, and be subjected to dual inspection fees and redundant regulations. The trial court erred in failing to issue a writ of mandate on this issue.

4. The Permit's "Peak Flow Control" Requirements Improperly Attempt to Regulate the Volume, Rather than the Quality of Water.

Part 4.D.1 of the Permit, imposes the following requirements:

> The Permittees shall control post-development peak storm water runoff discharge **rates, velocities, and duration** (peak flow control) in Natural Drainage Systems (i.e. mimic pre-development hydrology) to prevent accelerated stream erosion and to protect stream habitat. (18 AA 4721-22, emphasis added.)

Through these "peak flow control" requirements, Respondent has attempted to regulate the flow of water without regard to pollutant loads, if any, as opposed to regulating the discharge of pollutants into or within that water. The trial court made no specific finding on this issue, but instead found that the SUSMP provisions under Part 4.D of the Permit were not contrary to law. (37 AA 9779-86.)

The State's authority under the CWA's Municipal program is specifically limited to controls on "pollutants" discharged from MS4s. As the CWA states, MS4 permits are to include "controls to reduce the ***discharge of pollutants*** . . . and such other provisions . . . appropriate for the control of such ***pollutants.***" (33 U.S.C. § 1342(p)(3)(B)(iii); emph. added.) The CWA defines "pollutant" as follows:

> [D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked

> or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. (33 U.S.C. § 1362(6).)

Thus, the statutory definition of "pollutant" in the CWA simply does not include the flow of water itself, no matter its "rate, velocity or duration."

Moreover, cases interpreting the CWA have ***not*** expanded on this statutory definition of pollutants. For example, in *National Wildlife Fed'n v. Gorsuch* (D.C. Cir. 1982) 693 F.2d 156, the National Wildlife Federation argued that discharges from dams amounted to a "discharge of a pollutant" necessitating a NPDES permit. The Federation claimed that adverse water quality changes including low dissolved oxygen, cold and supersaturation constituted pollutants within the meaning of 33 U.S.C. § 1362(6). The Court rejected this argument and held that discharges of water from dams did not constitute discharges of pollutants within the meaning of the CWA and thus did not require an NPDES permit. *(Id*. at 171-72; see also *United States Ex Rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board* (6th Cir. 1983) 717 F.2d 992, 999.)

Plainly, the flow of water without a pollutant load itself is not a "pollutant." Accordingly, Respondent's attempt to regulate "peak flows" is arbitrary, capricious and unauthorized, as the CWA authorizes NPDES permits to regulate only the discharge of "pollutants."

The trial court erred in failing to issue the writ of mandate and in failing to find that the Respondent exceeded its jurisdiction in issuing an NPDES Permit that seeks to regulate the "quantity" as opposed to "quality" of water.

VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT PETITIONERS' REQUEST FOR DECLARATORY RELIEF

The Petitioners' First Amended Complaint included four separate causes of action seeking declaratory relief under Code of Civil Procedure § 1060. Specifically, Petitioners sought declaratory relief on: (1) whether the permittees were required to go beyond the MEP standard to comply with Part 2 of the Permit; (2) whether Part 2 of the Permit included a "safe harbor", i.e. whether permittees would be deemed to be in compliance with the Permit so long as they were acting in good faith in implementing BMPs to correct exceedences of water quality standards and conditions of nuisance; (3) whether those portions of Part 4(D) of the Permit that require Permittees to modify their general plans and CEQA review processes are contrary to law; and 4) whether the Respondent was required to consider "economics" and the Permit's impact on the need for "housing" within the Los Angeles region; and 5) whether Respondent was required to perform a cost/benefit analysis for the monitoring and reporting program prior to adopting the Permit. (14 AA 3563-3575, First Amended Petition, Second-Fifth Causes of Action.)

The trial court granted Respondent's demurrer to all four of these causes of action, based upon its finding that "declaratory relief [generally] cannot be used to review an administrative decision" and that Petitioners' requests for declaratory relief did not fall within any of the "exceptions" set forth under Cal. *for* Native Salmon, etc. Ass'n v. Dept. *of* Forestry ("Native Salmon"), (1990) 221 Cal.App.3d 1419. (13 AA 3262.)

On similar grounds, the Court denied Petitioners' Motion to Amend their Complaint to Conform to Proof, filed to permit Petitioners to file a Second Amended Complaint, to include a new Seventh Cause of Action for Declaratory Relief on the issues of the MEP standard, the "reasonableness" standard under the PCA, and the interpretation of Part 2 of the Permit. (Notice of Ruling re Trial on Issue 14 and Petitioners' Motions to Amend, 33 AA 8693; 7 RT 2171:26-28.)

Declaratory relief was clearly appropriate in this case, and the trial court erred both in granting Respondent's demurrer and in denying Petitioners' motion to amend.[25] Numerous cases support Petitioners' position that declaratory relief was appropriate under the circumstances. In Walker v. County *of* Los Angeles (1961) 55 Cal.2d 626, the Court

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[25] Petitioners' Motion to Amend to Conform to Proof should have been granted in accordance with the "policy of great liberality" that California courts are to apply in allowing amendments to pleadings "at any stage of the proceeding." (*Berman* v. Bromberg (1997) 56 Cal.App.4th 936, 945.) This policy applies to amendments to conform to proof. (Union Bank *v. Wendland* (1976) 54 Cal.App.3d 393,400.)

expressly found that the interpretation of ordinances and statutes were appropriate matters for declaratory relief. There, the California Supreme Court found that declaratory relief was appropriate for the very purpose of interpreting a particular section of the County's charter, even though it also found that mandamus was a "proper remedy to compel a city council or city civil service board to perform its mandatory duties prescribed by the charter." *(Id*. at 639.) The *Walker* Court held as follows:

> **Declaratory relief must be granted** when the facts justifying that course are sufficiently alleged (citation omitted); **its 'purpose . . . is to liquidate uncertainties and controversies which might result in future litigation,** [citation omitted.] This is not an attempt to interfere with a discretionary act of the board in the legislative process [citation omitted] but to obtain a clarification of the charter provision, section 47, regulating the board and the performance of its prescribed duty. **The interpretation of ordinances and statutes are proper matters for declaratory relief.** [citation omitted] Petitioners are not looking to the court to control the board's legislative discretion but to determine the meaning of charter section 47 and its effect on the prescribed legislative process.' (Id. at 636-37; emphasis added.)

Similarly, in *Native Salmon,* supra, *221* Cal.App.3d 1419, the case referenced by the trial court when it granted Respondent's demurrer to the declaratory relief claims, the court found that although a specific decision of an administrative agency can usually only be reviewed by a petition for administrative mandamus, there are several exceptions to this rule,

including where issues of "great public interest" are at stake, or where declaratory relief may be necessary to "avoid multiple actions." *(Id*. at 1430; see also Bess v. Park ("*Bess*") (1955) 132 Cal.App.2d 49, 52 [the "purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain dispute or jural relation [and to] liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation"].)

In the present case, the existing Permit is scheduled to expire on December 12, 2006. (18 AA 4757.) The issues upon which Petitioners have sought declaratory relief involve interpretations of both State and federal law, and State Board policy, and are issues that, if not finally resolved, will continue to create significant disputes "of great public interest" over future NPDES permits, resulting in 'multiple actions." For example, whether the State is limited by the "reasonableness" standard set forth under State law, and may only impose "reasonable" requirements to achieve water quality conditions "that could reasonably be achieved," are issues that will continue to arise in permit after permit, unless a determination is made on whether the PCA's "reasonableness" standards apply in the municipal NPDES Permit permitting context.

Similarly, whether the State must consider "econornics" and impacts on "housing within the region," when issuing an NPDES Permit, or must perform a "cost/benefit" analysis when imposing monitoring and

reporting obligations on municipalities, are issues that will continue to arise at the expiration of each 5 year NPDES permit. Finally, whether the State has the authority to impose requirements that exceed the MEP standard is a question of statutory interpretation that will continue to arise, unless a determination is made by the Court that resolves the issue and binds the future actions and practices of the State in issuing such Permits.

The trial court erred in refusing to grant declaratory relief in the Petitioners' favor on each of the above issues, as declaratory relief was and is necessary to "avoid multiple actions" and to "serve some practical end in quieting or stabilizing an uncertain dispute or jural relation." *(Native Salmon, supra,* 221 Cal.App.3d 1419, 1430; *Bess, supra,* 132 Cal.App.2d 49, 52.)

VII. CONCLUSION

The trial court erred in refusing to issue a writ of mandate invalidating the WDRs and NPDES Permit adopted by the Respondent Board on December 13, 2001, and in refusing to grant declaratory relief resolving the various disputes over the interpretations and application of State and federal law, and the propriety of the State's policies and practices, in the Appellants' favor.

Dated: February 13,2006

Respectfully submitted

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By: 
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ARCADIA, ET AL.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rule of Court 14(c)(1) the forgoing Opening Brief of Appellants is proportionally spaced in the typestyle Times New Roman and has a typeface of 13 points for all pages to be included in the page count, and contains 27,571 words as calculated by Microsoft Word 2000, including all headings, footnotes, quotations and sections except those specifically allowed to be excluded by Rule of Court 14(c)(1).

Dated: February 13,2006

Respectfully submitted

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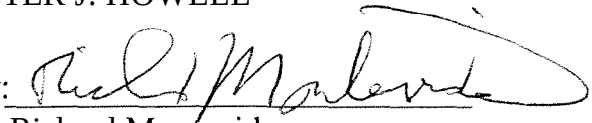
By: 

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ARCADIA, ET AL.

PROOF OF SERVICE BY MAIL & PERSONAL SERVICE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1998.

On February 14, 2006, I served as stated on the interested parties in said action the within document as stated on the attached mailing list:

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[X] (BY MAIL) I caused such envelope(s) with postage thereon fully prepared to be placed in the United States mail at Costa Mesa, California.

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[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 14, 2005, at Costa Mesa, California.

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Karen M. Hardy
(Type or print name)


(Signature)

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Karen M. Hardy
(Type or print name)


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