IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF BURBANK et al., Plaintiffs and Appellants, v. **STATE WATER RESOURCES CONTROL BOARD et al.,** Defendants and Appellants.	**NO. S119248**

Second Appellate District Nos. B150912, B151175 and B152562
Los Angeles Superior Court Nos. BS060960 and BS060957
The Honorable Dzintra I. Janavs, Judge

WATER BOARDS' ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

SUMMARY OF ARGUMENT 3

STATUTORY BACKGROUND 4

A. The Federal Clean Water Act 4

B. California's Porter-Cologne Water Quality Control Act 6

STATEMENT OF FACTS 8

STATEMENT OF THE CASE 11

STANDARD OF REVIEW 12

ARGUMENT 12

I. THE REGIONAL BOARD MUST CONSIDER ECONOMICS WHEN IT ESTABLISHES WATER QUALITY STANDARDS BUT NEED NOT RECONSIDER THESE FACTORS WHEN ESTABLISHING EFFLUENT LIMITATIONS IN WASTEWATER DISCHARGE PERMITS 12

A. At the Permitting Stage, Effluent Limitations Implementing Water Quality Standards must Be Developed According to Water Quality – Not Economics or Technical Feasibility 12

1. The Clean Water Act requires the Regional Board to include effluent limitations necessary to meet water quality standards 12

TABLE OF CONTENTS

Page

2. The Water Boards' interpretation of Water Code section 13263 is compelled by the Clean Water Act 16

a. For federal permits, the Water Code must be construed in a manner consistent with federal law 16

b. Water Code section 13241 analysis is only appropriate during permitting where effluent limitations are designed to achieve a purpose other than implementation of federally-approved water quality standards 18

c. The State Board's long-standing interpretation of state and federal water quality law is entitled to deference . . . 20

B. It Is Undisputed That Economics must Be Considered When Adopting Water Quality Standards, but the Cities' Procedural Challenges to the Basin Plan Cannot Be Asserted in a Permit Challenge Action and Cannot Be Evaluated on the Record Before the Court 21

1. As a matter of federal law, EPA-approved water quality standards must be implemented in any NPDES permit 22

2. The Basin Plan adoption proceedings are not part of the administrative record for this action 23

TABLE OF CONTENTS

Page

3. The Cities' challenges to the adoption of the water quality standards are time-barred and are improper in the context of a permit-challenge action 24

C. Planning and Reporting Requirements of the Clean Water Act Directing Consideration of Economic Factors Do Not Establish a Requirement That Economic Factors Be Considered at the Permitting Stage 24

D. Permitting Proceedings Before the Regional Board Are Not the Proper Forum for Raising Alleged Defects in Statewide Planning and Reporting Documents 27

E. Clean Water Act Provisions Addressing Cost-effective Treatment Technologies for POTWs Are Unrelated to the Derivation of Water Quality-Based Effluent Limitations for POTWs During Permitting Process 28

1. The Clean Water Act does not make cost-effectiveness the benchmark for regulation of POTWs 28

2. Congress and EPA have explicitly stated that POTWs must comply with section 301(b)(1)(C) 29

3. Contrary to the Cities' arguments, Congress did not intend the Clean Water Act pretreatment program to be the sole means of addressing toxic pollutant discharge from POTWs 30

TABLE OF CONTENTS

Page

II. THE REGIONAL BOARD'S ISSUANCE OF WASTEWATER DISCHARGE PERMITS IS EXEMPT FROM THE EIR REQUIREMENTS OF CEQA; MATTERS THAT WOULD BE CONTAINED IN AN EIR, SUCH AS REGULATORY ALTERNATIVES OR ENVIRONMENTAL IMPACTS, NEED NOT BE CONSIDERED 32

A. Water Code Section 13389 Exempts the Issuance of NPDES Permits from Compliance with the CEQA 33

1. Mandatory consideration of CEQA policies is not possible where the Regional Board is exempted from the obligation to create an environmental review document 33

2. State Board decisions and regulations require only that the Water Boards review other agencies' CEQA documents when they exist 35

B. NPDES Permits Issued by the Regional Board are Exempt from CEQA to Parallel the Clean Water Act Exemption from NEPA 35

C. Sections 208, 303 and 305 of the Clean Water Act Do Not Require the Regional Boards to Consider Regulatory Alternatives or Environmental Impacts at the Permitting Stage 36

D. EPA and the State Board have Adopted Regulations Defining When Effluent Limitations Are "Necessary" . . . 36

TABLE OF CONTENTS

Page

III. WASTEWATER DISCHARGE PERMITS CANNOT CONTAIN A COMPLIANCE SCHEDULE UNLESS THE WATER QUALITY STANDARD BEING IMPLEMENTED SPECIFICALLY AUTHORIZES DELAYED COMPLIANCE 38

A. Section 301(b)(1)(C) of the Clean Water Act prohibits compliance schedules for water quality-based effluent limitations unless the water quality standard being implemented specifically provides for compliance schedules 39

B. EPA's decision that the Cities Permits may not include Compliance Schedules is Entitled to Deference 41

C. The Cities' Argument That Water Quality Standards must Contain Allowances for Compliance Schedules Is Without Merit 41

IV. THE NARRATIVE TOXICITY OBJECTIVE DOES NOT VIOLATE THE CODE OF FEDERAL REGULATIONS 42

V. THE ADMINISTRATIVE PROCEDURES ACT DOES NOT APPLY TO TRANSLATION OF THE NARRATIVE TOXICITY OBJECTIVE 45

CONCLUSION 47

TABLE OF AUTHORITIES

Page

U.S. Supreme Court Cases

Arkansas v. Oklahoma
(1992) 503 U.S. 91 . . . . 13, 15, 16

Chevron, U.S.A. v. NRDC
(1984) 467 U.S. 837 . . . . 12, 41, 44

Skidmore v. Swift & Co.
(1944) 323 U.S. 134 41

United States v. Mead Corp.
(2001) 533 U.S. 218 41

Whitman v. American Trucking Associations, Inc.
(2001) 531 U.S. 457 25

Federal Courts of Appeals and District Court Cases

Ackels v. EPA
(9th Cir. 1993) 7 F.3d 862 . . . . 13, 14, 15, 16

American Iron and Steel Institute v. United States Environmental Protection Agency
(D.C. Cir. 1997) 115 F.3d 979 37

American Paper Institute, Inc. v. United States Environmental Protection Agency
(D.C. Cir. 1993) 996 F.2d 346 . . . . 15, 16

Defenders of Wildlife v. Browner
(9th Cir. 1999) 191 F.3d 1159 . . . . 13, 14, 15, 16

Natural Resources Defense Council v. United States Environmental Protection Agency
(9th Cir. 1990) 915 F.2d 1314 26

TABLE OF AUTHORITIES

Page

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Pacific Legal Foundation v. Quarles
(C.D. Cal. 1977) 440 F.Supp 316 35

The Piney Run Perservation Association v. County Commissioners of Carroll County, Maryland
(4th Cir. 2001) 268 F.3d 255 15

California Cases

Hampson v. Superior Court
(1977) 67 Cal.App.3d 472 20

Moore v. California State Bd. of Accountancy
(1992) 2 Cal.4th 999 21

Pacific Water Conditioning Assoc. Inc. v. City of Riverside
(1977) 73 Cal.App.3d 546 36

People v. Bradley
(1969) 1 Cal.3d 80 13

Sierra Club v. State Board of Forestry
(1994) 7 Cal.4th 1215 . . . . 33, 34

Tidewater Marine Western, Inc. v. Bradshaw
(1996) 14 Cal.4th 557 46

United States v. Superior Court
(1941) 19 Cal.2d 189 . . . . 25, 28

Yamaha Corp. of America v. State Bd. of Equalization
(1998) 19 Cal.4th 1 . . . . 12, 20, 21

TABLE OF AUTHORITIES

Page

California Cases, ctd.

Western States Petroleum Ass'n. v. Superior Court
(1995) 9 Cal.4th 559 23

Whitcomb Hotel, Inc. v. Cal. Emp. Com.
(1944) 24 Cal.2d 753 12

Federal Statutes

33 U.S.C. § 1251(a) 2, 4, 16

33 U.S.C. § 1251(a)(1) 4, 30, 31

33 U.S.C. § 1251(a)(3) 4, 31, 43

33 U.S.C. § 1251(d) 41

33 U.S.C. § 1281(a) 28

33 U.S.C. § 1288 (CWA § 208) 24, 25, 27

33 U.S.C. § 1288(b) 26

33 U.S.C. § 1295 28

33 U.S.C. § 1297 28

33 U.S.C. § 1300 28

33 U.S.C. § 1311 (CWA § 301) 15

33 U.S.C. § 1311(a) 5

33 U.S.C. § 1311(b) 26

TABLE OF AUTHORITIES

Page

Federal Statutes, ctd.

33 U.S.C. § 1311(b)(1) 15

33 U.S.C. § 1311(b)(1)(A) 15

33 U.S.C. § 1311(b)(1)(B) 6, 15

33 U.S.C. § 1311(b)(1)(C) . . . . passim

33 U.S.C. § 1311(i) 29

33 U.S.C. § 1313(a)-(c) 4

33 U.S.C. § 1313(c)(1) 5, 24

33 U.S.C. § 1313(c)(2) 7, 13

33 U.S.C. § 1313(c)(2)(A) 7

33 U.S.C. § 1313(c)(3) 22

33 U.S.C.§ 1313(d)(1)(C) 37

33 U.S.C. § 1313(e) 25, 27

33 U.S.C. § 1313(e)(3)(F) 41

33 U.S.C. § 1314(a)(1) 5

33 U.S.C. § 1315 (CWA § 305) 26

33 U.S.C. § 1315(b) 25, 26, 27

33 U.S.C. § 1317(b) 30

TABLE OF AUTHORITIES

Page

Federal Statutes, ctd.

33 U.S.C. § 1317(b)(1) 31

33 U.S.C. § 1342 5

33 U.S.C. § 1342(a) 5, 41

33 U.S.C. § 1342(b) 5

33 U.S.C. § 1342(b)(1)(A) 6

33 U.S.C. § 1342(c)(3) 8, 39

33 U.S.C. § 1362(7) 7

33 U.S.C. § 1362(14) 5

33 U.S.C. § 1365(a)(2) 22

33 U.S.C. § 1371(c)(1) 35

42 U.S.C. § 4321 35

Federal Regulations

40 C.F.R. § 122.41 (2003) 6

40 C.F.R. § 122.44(d)(1) (2003) 6, 12, 13, 29, 30

40 C.F.R. § 122.44(d)(1)(i) (2003) 37, 38

40 C.F.R. § 122.44(d)(1)(vi) (2003) 44, 45

40 C.F.R. § 122.44(d)(1)(vi)(A) – (C) (2003) 45

TABLE OF AUTHORITIES

Page

Federal Regulations, ctd.

40 C.F.R. § 122.44(d)(1)(vi)(B) (2003) 45, 46

40 C.F.R. § 122.44(d)(1)(vii) (2003) 44

40 C.F.R. § 122.44(k)(3) (2003) 29

40 C.F.R. § 123.63 (2003) 8, 39

40 C.F.R. § 131.6 (2003) 5

40 C.F.R. § 131.10 (2003) 5

40 C.F.R. § 131.11 (2003) 5, 44

40 C.F.R. § 131.11(a)(2) (2003) 42, 43, 44, 45

40 C.F.R. § 131.12 (2003) 5

40 C.F.R. § 131.38 (2003) 43

40 C.F.R. § 131.38(b)(1) (2003) 9

40 C.F.R. § 131.38(e) (2003) 39

Federal Register

54 Fed. Reg. § 23873 30

59 Fed. Reg. § 37494 - 95 30

TABLE OF AUTHORITIES

Page

Federal Administrative Decisions

In the Matter of Star-Kist Caribe, Inc.,
NPDES Appeal No. 88-5, 1990 WL 324290 . . . . 40, 41, 42

In re: City of Moscow, Idaho
NPDES Appeal No. 00-10, 2001 WL 988721 40

California Statutes

Code Civ. Proc. § 343 24

Code Civ. Proc. § 1085 24

Code Civ. Proc. § 1094.5 . . . . 11, 24

Code Civ. Proc. § 1094.5, subd. (c) 23

Gov. Code, § 11340 . . . . 4, 45

Gov. Code, § 11342.600 46

Gov. Code, § 11352, subd. (b) 45, 46

Gov. Code, § 11353, subd. (b) 6

Pub. Resources Code, § 21000 3

Pub. Resources Code, § 21100 32

Pub. Resources Code, § 21080.5 . . . . 7, 33, 34

Pub. Resources Code, § 21080.5 subd. (d)(3) 33

Wat. Code, § 13000 6

Page

California Statutes, ctd.

Wat. Code, § 13050 6

Wat. Code, § 13050, subd. (e) 7

Wat. Code, § 13050, subd. (f) 6

Wat. Code, § 13050, subd. (h) 7

Wat. Code, § 13100 6

Wat. Code, § 13142 7

Wat. Code, § 13200 6

Wat. Code, § 13240 . . . . 6, 7

Wat. Code, § 13241 . . . . passim

Wat. Code, § 13241, subd. (d) 21

Wat. Code, § 13242 . . . . 7, 41, 42

Wat. Code, § 13242, subd. (b) 42

Wat. Code, § 13245 7

Wat. Code, § 13263 . . . . passim

Wat. Code, § 13263, subd. (a) 17, 19

Wat. Code, § 13263, subd. (c) 40

Wat. Code, § 13263, subd. (g) 27

TABLE OF AUTHORITIES

Page

California Statutes, ctd.

Wat. Code, § 13263.6 37

Wat. Code, § 13300 10

Wat. Code, § 13320 20

Wat. Code, § 13370 . . . . 5, 8

Wat. Code, § 13372 . . . . 8, 17

Wat. Code, § 13374 . . . . 7, 18

Wat. Code, § 13377 . . . . 5, 7, 8, 17, 18, 36

Wat. Code, § 13382.5 7

Wat. Code, § 13385, subd. (i) 39

Wat. Code, § 13389 . . . . 32, 33, 34, 36

California Regulations

Cal. Code Regs., tit. 14, § 15251, subd. (g) 7, 34

Cal. Code Regs., tit. 23, § 2235.2 . . . . 8, 44

Cal. Code Regs., tit. 23, § 2914 . . . . 37, 38, 43

Cal. Code Regs., tit. 23, § 3939.3 39

TABLE OF AUTHORITIES

Page

California Administrative Decisions

In the Matter of the Petition of the Cities of Palo Alto, et al.
State Board Order No. WQ 94-8 20

In the Matter of the Petitions of Napa Sanitation Dist., et. al
State Board Order No. WQ 2001-016 19

In the Matter of the Petition of Pacific Water Conditioning Association, Inc.
State Board Order No. WQ 77-16
1977 Cal. ENV LEXIS 59 (1977) 34

In the Matter of the Petition of the Sierra Club, San Diego Chapter
State Board Order No. WQ 84-7
1984 Cal. ENV LEXIS 13 (1984) 35

In the Matter of the Petition of Robert and Frederick Kirtlan,
State Board Order No. WQ75-8
1975 Cal. ENV LEXIS 45 (1975) 35

Other Authorities

Rodgers, Environmental Law: Air and Water
(1986) §§ 4.9, 4.21 26

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CITY OF BURBANK et al.,

Plaintiffs and Appellants,

NO. S119248

v.

STATE WATER RESOURCES CONTROL BOARD et al.,

Defendants and Appellants.

INTRODUCTION

In 1972, after decades of failed water pollution efforts, Congress mandated that levels of water quality set by state regulations ("water quality standards") shall be achieved and that a two-pronged approach was necessary to that end. Congress dictated that technology-based limits shall be imposed in discharge permits to ensure that each point source performs at a level consistent with the "best available technology." "Secondary treatment" was determined to be the "best available technology" for publicly owned treatment works ("POTWs") in 1972. Recognizing that technology alone would not be adequate to accomplish its goals, Congress also insisted that permits include "any more stringent limitation . . . necessary to meet water quality standards." (33 U.S.C. § 1311(b)(1)(C).)

After more than 30 years of settled law, the Cities of Burbank and Los Angeles (collectively, the "Cities") ask this Court to rule that a polluter's economic circumstance—not attainment of water quality standards—governs the limitations imposed in their permits. Their bold assertion is based upon a novel interpretation of a provision of Water Code section 13263, one of the California statutes that govern waste discharge requirements. The State Water Resources Control Board ("State Board") and the California Regional

Water Quality Control Board for the Los Angeles Region ("Regional Board") (collectively, the "Water Boards") agree that economic factors should be considered when regulating water quality, but disagree that they must be reconsidered each time a permit is issued. Water quality standards are established in a regulatory proceeding during which the Water Boards take comments from interested parties representing diverse societal interests and consider a variety of factors, including economics, and alternatives and mitigation for significant environmental impacts. These factors generally are not reconsidered every time the standards are implemented in permits.

In a prayer that would prevent California waters from ever attaining water quality standards, the Cities ask this Court to rule that the foundations of the water quality standards must be reconsidered for each discharger every time a permit is renewed even though challenges to these "foundations" cannot be evaluated on the record before the Court, are time-barred, and the Cities have not exhausted their administrative remedies. They further ask that their effluent limitations be relaxed if it costs the discharger too much. This novel interpretation is contrary to federal and state law and practice for 30 years, and is contrary to an express legislative mandate that in implementing the provisions of the Clean Water Act, the California Water Code "shall be construed to ensure consistency with" the federal act.

The questions now to be decided will determine whether the course of water quality regulation will be radically altered or whether the congressional goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters will continue. (33 U.S.C. § 1251(a).) For sound legal and policy-based reasons, this Court should protect the water of the citizens of California, and reject the Cities' construction.

SUMMARY OF ARGUMENT

In their first issue for review, the Cities advocate an interpretation of water quality law that would, if adopted, preclude achievement of congressional and state goals. Currently, state water quality standards are established by regulation, in a proceeding that considers a variety of factors, including the economics of achieving the standards. The purpose of wastewater discharge permits is to implement restrictions on pollution so that levels of water quality set by those prior regulations are achieved. The Cities assert that the propriety of water quality regulations must be reconsidered during every permitting proceeding. Neither state nor federal law allows such reconsideration.

The Cities also argue that economics were not considered when the water quality standards were adopted, but that claim cannot be evaluated on the record before the Court. The water quality standards adoption proceedings are not included in the administrative record of this challenge to permitting proceedings.

In their second issue, the Cities claim that the Regional Board should comply with the California Environmental Quality Act ("CEQA") (Pub. Resources Code, §§ 21000 et seq.) when issuing federal wastewater discharge permits and must demonstrate that effluent limitations provide an environmental benefit. Because the Legislature has exempted issuance of these permits from CEQA, and because federal Environmental Protection Agency ("EPA") regulations do not require effluent limitations to be justified by a showing of environmental benefit, the Cities cannot prevail on these claims.

The third issue raises the question of whether the Regional Board may allow delayed compliance with water quality standards for certain pollutants even though Congress has prohibited delayed compliance under the circumstances. To avoid undermining the will of Congress and the Legislature, the Cities must be denied relief on this issue.

The fourth and fifth issues pertain to a component of water quality standards know as a "narrative objective." This particular narrative objective prohibits the issuance of a permit that would allow discharges of toxic substances in amounts that are toxic to organisms in the receiving water or humans. The Cities incorrectly contend that this narrative toxicity objective does not comply with EPA regulations and that its implementation in wastewater discharge permits is subject to the Administrative Procedures Act ("APA"). (Gov. Code, §§ 11340 et seq.) Because the EPA has determined that the narrative toxicity objective does comply with its regulation, and because wastewater discharge permits are not rules of general application subject to the APA, the Cities arguments should be rejected.

STATUTORY BACKGROUND

A. The Federal Clean Water Act

Congress enacted the Clean Water Act in 1972 as amendments to the Federal Water Pollution Control Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) The ultimate objective of the Clean Water Act is to eliminate all discharges of pollutants. (33 U.S.C. § 1251(a)(1).) National policy prohibits the discharge of toxic pollutants in toxic amounts. (33 U.S.C. § 1251(a)(3).) The Act also sets forth an interim goal to achieve fishable and swimmable waters nationwide, where attainable, by 1983. (33 U.S.C. § 1251(a)(2).)

Each state is required to establish water quality standards that define the uses of the state's water bodies and the ambient water quality necessary to protect those uses. (33 U.S.C. § 1313(a)-(c); 40 C.F.R., part 131 (2003).) Water quality standards consist of three required elements: (1) designated "beneficial uses," such as "public water supply" or "protection and propagation of fish, shellfish and wildlife; (2) "water quality criteria" to protect the designated uses; and (3) an "antidegradation" policy consistent with the federal

policy. (40 C.F.R. §§ 131.6, 131.10, 131.11, 131.12 (2003).) Every three years, states are required to review their water quality standards and make any appropriate modifications. (33 U.S.C. § 1313(c)(1).)

Water quality criteria are descriptions of the amount of a pollutant that may be present in the receiving water while still protecting the designated "beneficial uses." For example, the water quality criteria for fishing will require that the level of pollutants be set low enough that fish are not harmed, killed or contaminated to a degree that they would be unsafe for consumption. For toxic pollutants, water quality criteria are based on analysis and reflect the "latest scientific knowledge." (33 U.S.C. § 1314(a)(1); see, e.g. BAA I 001-300.) These criteria may be set forth in numeric form, such as "no more than 5.2 micrograms per liter of cyanide," or in a narrative form, such as "no toxic pollutants in toxic amounts."

To apply water quality standards to individual polluters, the Clean Water Act establishes a permitting system known as the National Pollution Discharge Elimination System ("NPDES"), which regulates the discharge of pollutants from "point sources" into waters of the United States. The Clean Water Act expressly prohibits any point source discharge of pollutants into the waters of the United States without an NPDES permit. (33 U.S.C. §§ 1311(a), 1342.) A point source is any discernible, confined or discreet conveyance, such as a pipe, from which pollutants may be discharged. (33 U.S.C. § 1362(14).) The discharge limitations are implemented through individual NPDES permits issued either by EPA or by a state with an authorized NPDES program. (33 U.S.C. § 1342(a), (b).) EPA has authorized the State of California to implement the NPDES program in California. (See Wat. Code, §§ 13370, 13377.)

The Clean Water Act mandates that NPDES permits issued by state agencies must ensure compliance with all applicable requirements of the Act.

(33 U.S.C. § 1342(b)(1)(A), 40 C.F.R. § 122.41 et seq. (2003).) Compliance with the Clean Water Act is usually accomplished with effluent limitations contained in NPDES permits. There are two types of effluent limitations: technology-based effluent limitations, and water quality-based effluent limitations. An example of technology-based effluent limitations is the requirement that POTWs perform at a level consistent with "secondary treatment" – a particular type of treatment technology. (33 U.S.C. § 1311(b)(1)(B).) In addition to these technology-based limits, each NPDES permit must include "any more stringent limitation[s]" necessary to meet the water quality standards applicable to the water body receiving the discharge. (33 U.S.C. §§ 1311(b)(1)(C), 40 C.F.R. § 122.44(d)(1) (2003).) These more stringent limitations are called "water quality-based effluent limitations."

B. California's Porter-Cologne Water Quality Control Act

The Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), enacted in 1969, establishes state policy "that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." (Wat. Code, § 13000.) The Porter-Cologne Act designates the State Board and the nine regional boards as the state agencies with primary responsibility for coordination and control of water quality. (Wat. Code, §§ 13000, 13100, 13200.)

The Porter-Cologne Act requires the regional boards to adopt water quality control plans, also called basin plans, for the hydrologic areas within each region. (Wat. Code, § 13240.) Basin plans are adopted as formal state regulations under a special provision of the APA. (Gov. Code, § 11353, subd. (b).) The basin plans (1) identify the beneficial uses[1] of the water to be

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[1] "Beneficial uses," defined at Water Code section 13050, subdivision (f), are the state law equivalent of federal "designated uses." "Water quality objectives" under state law are the equivalent of "water quality criteria" under federal law. (Compare Wat. Code, § 13050, subd. (h) with 33 U.S.C. §

protected, (2) establish "water quality objectives" to protect those uses, and (3) establish implementation programs for achieving the objectives.

When establishing water quality objectives, regional boards consider several factors, including economic considerations. (Wat. Code, § 13241.) The Water Boards' basin planning program is a certified regulatory program under Public Resources Code section 21080.5 because alternatives and mitigation for significant adverse environmental impacts are considered when adopting or amending basin plans. (Cal. Code Regs., tit. 14, § 15251, subd. (g).)

The basin plans are approved by the State Board and, for regulatory activities subject to the Clean Water Act, the EPA. (Wat. Code, § 13245; 33 U.S.C. § 1313(c)(2).) The beneficial uses and water quality objectives in the basin plan, applicable state water quality control plans, and an antidegradation policy constitute the water quality standards for purposes of compliance with the Clean Water Act. (Wat. Code, §§ 13142, 13240, 13241, 13242.)

The regional boards have primary responsibility for implementing the requirements of state water quality policy and the basin plans into "waste discharge requirements" ("WDRs") issued to individual sources of pollution. (Wat. Code, §§ 13263, 13377, 13382.5.) The Porter-Cologne Act applies to all waters of the state (including surface and ground waters), while the Clean Water Act only applies to waters of the United States. (Compare Wat. Code, § 13050, subd. (e) and 33 U.S.C. § 1362(7).) For discharges to waters of the United States, the WDRs serve as federal NPDES permits. (Wat. Code, § 13374.)

When developing effluent limitations for these permits, Regional Boards generally do not reconsider the factors, such as economics, that were considered during adoption of the water quality standards implemented by the permits.

In 1972, subsequent to the passage of the federal Clean Water Act, the

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1313(c)(2)(A).)

California Legislature amended the Porter-Cologne Act to implement the federal Clean Water Act and to allow the state to assume responsibility for issuing permits pursuant to federal law. (Wat. Code, §§ 13370 et seq.) The Legislature declared that it was in the state's interest to avoid direct implementation of the Clean Water Act by the federal government. (Wat. Code, § 13370.) The 1972 amendments provide that, "[n]othwithstanding any other provision" of the Porter-Cologne Act, waste discharge requirements issued by the state must "apply and ensure full compliance" with the Clean Water Act. (Wat. Code, § 13377; see also Cal. Code Regs., tit. 23, § 2235.2.) The amendments further provide that the Porter-Cologne Act must be read to conform with the requirements of the Clean Water Act, even if it would result in inconsistencies with the specific provisions of state law. "The provisions of the [Porter-Cologne chapter implementing the Clean Water Act] shall prevail over the [remainder of the Porter-Cologne Act] to the extent of any inconsistency." (Wat. Code, § 13372.) Failure by the state to comply with the requirements of the Clean Water Act can result in the revocation of the state's authority to issue NPDES permits. (See 33 U.S.C. § 1342(c)(3); 40 C.F.R., § 123.63 (2003).)

STATEMENT OF FACTS

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant and jointly owns the Los Angeles – Glendale Water Reclamation Plant with the City of Glendale. (Los Angeles Appellants' Appendix ("LAA") VIII 2281, 2187.) The City of Burbank owns and operates both the Burbank Water Reclamation Plant and the Burbank Steam Power Plant. (Burbank Appellants' Appendix ("BAA") XII 3527.) Each plant is operated as a POTW under a separate NPDES permit. (LAA VIII 2183 – 2276; VIII 2277 – IX 2401; BAA VI 1538.)

Wastewater from the plants is discharged to the Los Angeles River or to

the Burbank Western Wash upstream from its confluence with the Los Angeles River. (LAA VIII 2284, 2189; BAA VI 1543.) The Los Angeles River is a water of the United States. (*Ibid.*) Most of the flow in these receiving waters during dry weather is comprised of the Cities' wastewater discharge, so the quality of their effluent essentially determines the water quality in the receiving waters. (BAA VII 2096; XII 3527.) The existing beneficial uses of the Los Angeles River and downstream waters include contact and non-contact recreation, warm freshwater habitat, commercial and sport fishing, and marine habitat. (BAA VI 1545-46.) Potential beneficial uses include shellfish harvesting. (BAA VI 1546.) These beneficial uses are set forth in the Regional Board's Basin Plan, which was approved by the Office of Administrative Law in 1995. (LAA IV 0988.)

The Cities requested re-issuance of their permits. (See, e.g., LAA V 1292.) The Regional Board considered extensive comments from interested parties including the Cities, EPA, and environmental groups at a public hearing, and ultimately issued new NPDES permits to Los Angeles for the Los Angeles – Glendale plant on July 2, 1998, and for the Tillman plant on July 9, 1998, and to Burbank for its plant on July 2, 1998. (LAA VIII 2277, 2183; V 1291– VII 1899; BAA VI 1538, V 1294, VI 1629.) The permits contained numerical effluent limitations for some toxic pollutants that were more stringent than the Cities' prior permits because the effluent limitations were necessary to protect the beneficial uses of the receiving waters.[2] The Regional Board determined

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[2] The Cities state that "[m]any of the effluent limitations in the Cities' 1998 permits were more stringent than state and federal drinking water standards." (Opening Brief on the Merits ("Opening Brief"), p. 4.) However, aquatic habitat uses are often more sensitive than drinking water uses, and criteria to protect those uses are more stringent. For example, levels of chlorine safe for human consumption in tap water can be lethal to fish. (See, e.g., 40 C.F.R. § 131.38(b)(1) (2003) (California Toxics Rule prescribing 9.0 μg/L criterion maximum concentration for copper in freshwater aquatic habitat, but

that the presence of these pollutants in the Cities' wastewater had the reasonable potential to cause or contribute to a violation of the Basin Plan's narrative toxicity water quality standard. (LAA VIII 2194, 2288-89; BAA VI 1548, IV 0962-63.)

Early drafts of the Los Angeles-Glendale and Burbank permits contained interim effluent limitations (a compliance schedule). (LAA VI 1703-06; BAA V 1298 – 1303.) A compliance schedule provides an interim effluent limitation that is less stringent than the effluent limitation the Regional Board determined necessary to comply with the Clean Water Act. Compliance with the schedules constitutes compliance with the permits, and, therefore, compliance with the Clean Water Act. After receiving a comment from EPA stating that these interim limitations violated federal law because they were not authorized by the water quality standards and that EPA would formally object to the permits if they were not removed (LAA VII 1896-99; BAA V 1471-72), the Regional Board removed the interim limitations. (LAA VII 1900-02; BAA V 1473.) The final permits retained compliance schedules for ammonia, as authorized in the Basin Plan. (LAA VIII 2288, 2193; BAA VI 1547.) The Regional Board issued separate time schedule orders under Water Code section 13300 setting interim limitations and a schedule to bring the Cities into ultimate compliance for effluent limitations that could not be met immediately. (LAA X 2971-77, 2978-85; BAA VII 1957-63.)

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allowing 1300 μg/L when protecting human health for drinking water and consumption of organisms from the water).) The Cities also maintain that some of the effluent limitations "were set to protect species of aquatic life not present in these waters . . . ." (Opening Brief, p. 4.) Because its criteria are established to protect representative species, EPA stated in the preamble to its regulations that ". . . it is not necessary that the specific organisms tested be actually present in the water body." (BAA II 0371.)

STATEMENT OF THE CASE

Los Angeles and Burbank each filed petitions for peremptory writs of mandate under Code of Civil Procedure section 1094.5 on December 23, 1999, in the Superior Court for the County of Los Angeles. The Cities prayed for writs directing the Water Boards to set aside challenged provisions of the NPDES permits issued to the Cities by the Regional Board and seeking a stay of the challenged permit conditions. (LAA XI 3115-48; BAA VII 2017-49.) The requested stay was granted. (LAA XI 3159-60; BAA VII 2098.) After a hearing on the merits, the superior court granted the Cities' petition and ruled in their favor on most issues. (BAA XVII 5007-09, 4989 – 5004; BAA XII 3379-81, 3382-97.)

The Water Boards appealed six issues, including the superior court's ruling requiring the Regional Board to consider economics and other factors when developing permit effluent limitations. (LAA XVII 5041-42; BAA XVI 4560-61; Slip Op., p. 5.) The Water Boards did not appeal the remaining issues, such as the ruling that the Regional Board did not make findings adequate to "bridge the analytical gap" between the narrative toxicity objective and the numerical limitations imposed or to otherwise support the contested permit provisions. (LAA XVII 4999:4 – 5000:11; BAA XII 3392:5 – 3393:11.)

The Court of Appeal consolidated the Cities' cases for oral argument and consideration in one opinion, and reversed the judgment of the superior court finding in favor of the Water Boards on all issues. This Court granted the Cities' petition for review on November 19, 2003.

STANDARD OF REVIEW

The primary issues before the Court are questions of statutory or regulatory interpretation, which are questions of law. While the Court has "'final responsibility for the interpretation of the law,'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4 (quoting *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757), administrative agency interpretations of statutes and regulations are accorded deference in such situations. (*Yamaha*, *supra*, 19 Cal.4th at pp. 12-13; *Chevron, U.S.A. v. NRDC* (1984) 467 U.S. 837, 842-43.)

ARGUMENT

I.

THE REGIONAL BOARD MUST CONSIDER ECONOMICS WHEN IT ESTABLISHES WATER QUALITY STANDARDS BUT NEED NOT RECONSIDER THESE FACTORS WHEN ESTABLISHING EFFLUENT LIMITATIONS IN WASTEWATER DISCHARGE PERMITS.

A. At the Permitting Stage, Effluent Limitations Implementing Water Quality Standards must Be Developed According to Water Quality – Not Economics or Technical Feasibility.

1. The Clean Water Act requires the Regional Board to include effluent limitations necessary to meet water quality standards.

The Regional Board was required to include in the Cities' permits any and all effluent limitations needed to meet water quality standards for the receiving water. Clean Water Act section 301(b)(1)(C) (33 U.S.C. § 1311(b)(1)(C)) imposes this requirement on the Regional Board, as does EPA's regulation to implement that section, 40 Code Federal Regulations part 122.44(d)(1) (2003). Section 301(b)(1)(C) provides that permits must contain "any more stringent limitation, including those necessary to meet water quality standards." (33 U.S.C. § 1311(b)(1)(C).) 40 Code of Federal Regulations part

122.44(d)(1) (2003) similarly requires that permits include effluent limits that achieve water quality standards. Clean Water Act section "301(b)(1)(C) expressly identifies the achievement of state water quality standards as one of the Act's central objectives." (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 106.)

Federal court decisions interpreting federal law ". . . are persuasive and entitled to great weight. [Citations]." (*People v. Bradley* (1969) 1 Cal.3d 80, 86.) The United States Court of Appeals for the Ninth Circuit has unambiguously held that economics may not be considered when setting NPDES permit effluent limitations. In *Ackels v. EPA* (9th Cir. 1993) 7 F.3d 862, a group of individual Alaskan gold miners petitioned the Ninth Circuit to review NPDES permits issued by EPA. (*Id.* at p. 864.) The petitioners in *Ackels* argued that the effluent limitations EPA imposed on water clarity should be invalidated because "the permit limitation is not economically obtainable." (*Id.* at p. 865.) The Ninth Circuit rejected this argument:

> [T]he [NPDES effluent] limitation is necessary to comply with state water quality standards, and the Clean Water Act requires the permits to meet the state water quality standards. See 33 U.S.C. §§ 1311(b)(1)(C), 1313(c)(2). Accordingly, the economic and technological restraints are not a valid consideration.

(*Id.* at pp. 865-66 (emphasis added).)

Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159 also discussed whether economics or other factors should be considered when developing NPDES effluent limitations. In *Defenders of Wildlife*, a group of environmental organizations sued to challenge NPDES permits EPA had issued to a number of municipalities for discharges from municipal storm sewers. (*Id.* at p. 1161.) The gravamen of the environmental groups' complaint was that an EPA permit had not included numeric effluent limitations ensuring strict compliance with state water quality standards. (*Ibid.*) The court held that, because Congress had enacted special provisions of the Clean Water Act regulating storm water discharges, discharges from storm sewers may be

regulated differently from other types of point sources that do require strict compliance with state water quality standards. (*Id.* at pp. 1164-66.) The part of the opinion relevant to this case, however, is the court's description of what an NPDES permit "ordinarily" requires:

> [The permitting agency] also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability" . . . . [citations].

(*Id.* at p. 1163.) Thus, under the "ordinary" circumstances of a non-storm water permit, the agency may not consider practicability when setting effluent limitations. The Cities' permits are "ordinary" point source discharges subject to section 301(b)(1)(C).

Water quality-based effluent limitations under section 301(b)(1)(C) by definition must be based on water quality. Economics, while properly considered when setting water quality standards, are not authorized for consideration at the permitting stage.

The Opening Brief does not address the cases cited above, and criticizes the Court of Appeal for relying upon mere "judicial . . . interpretations made without any statutory support." (Opening Brief, p. 24.) Before the Court of Appeal, the Cities were unable to distinguish *Ackels* and *Defenders of Wildlife*. Instead, they merely asserted that these Ninth Circuit cases were wrongly decided and raised factual distinctions: *Ackels* involved an industrial pollution source and *Defenders of Wildlife* involved storm water. (Los Angeles' Response Brief, pp. 14-15; Burbank's Response Brief, pp. 16-17.) Because the Cities discharge from POTWs instead of from industrial or storm water sources, they claimed to be subject to special and different regulation under the Clean Water Act. The Cities also argued that both Ninth Circuit cases involve permits issued by EPA and not by a state. (Burbank's Response Brief, p. 16.)

It is true that industrial discharges and storm water discharges are regulated differently from POTW discharges in some portions of the Clean Water Act. Industrial discharges, for instance, are covered by section 301(b)(1)(A) while section 301(b)(1)(B) addresses POTWs. But both industrial and POTW discharges, and both state and federally issued permits, are subject to 301(b)(1)(C).

> In either case [whether the permit was issued by EPA or a state], section 301 of the Act mandates that every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls, see 33 U.S.C. §§ 1311(b)(1)(A), and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollutant to meet "water quality standards." 33 U.S.C. §§ 1311(b)(1)(C).

(*American Paper Institute, Inc. v. United States Environmental Protection Agency* (D.C. Cir. 1993) 996 F.2d 346, 349 (emphasis added).) The distinctions raised by the Cities do not lessen the applicability of *Ackels* or *Defenders of Wildlife* to their discharges.[3]

The Cities' interpretation of Clean Water Act section 301(b)(1) (33 U.S.C. § 1311(b)(1)), among other failings, conflicts with a unanimous United States Supreme Court decision interpreting the statute to require achievement of the more stringent water quality standards in subsection (b)(1)(C) and applying that requirement to a POTW. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 96, fn. 3, 106.) The Cities contend that the "or" between section 301(b)(1)(B) and 301(b)(1)(C) (33 U.S.C. § 1311(b)(1)(B) – (C)) was improperly read by the Court of Appeal as an "and"; according to the Cities,

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[3] Some amicus letters submitted to this Court by discharger interests cited *The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland* (4th Cir. 2001) 268 F.3d 255, 265-66. The case does not support the dischargers' argument that technological feasibility should be considered at the permitting stage because the portion of the opinion they cite is dicta, is contrary to the plain language of title 33 United States Code section 1311 and is not supported by the authority relied upon in the decision.

these two portions of the statute are mutually exclusive alternatives. (Petition for Review, pp. 21-23.) They claim that neither section 301(b)(1)(B) nor section 301(b)(1)(C) is applicable in all cases, which is contrary to the Supreme Court's interpretation describing section 301(b)(1)(C) as always applicable. (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 96, fn. 3.) The Court of Appeal, however, applied the same interpretation as the high court. (Slip Op., pp. 12, 14; see also *Ackels*, *supra*, 7 F.3d at pp. 865-66; *Defenders of Wildlife*, *supra*, 191 F.3d at p. 1163; *American Paper Institute*, *supra*, 996 F.2d at p. 349 (applying same interpretation).) The Cities' reading would also thwart the objectives of the Clean Water Act to "restore and maintain" the Nation's waters (33 U.S.C. § 1251(a)) because it would severely restrict the permitting agency's ability to bring about improvements in, or even maintenance of, water quality.

The Cities assert that effluent limitations under section 301(b)(1)(C) are proper only "if imposed 'not later than July 1, 1977.' [Citations]." (Petition for Review, p. 17.) In the Cities' view, the statutory deadline is not for dischargers to comply with any more stringent standard, but instead is a deadline after which permitting agencies may no longer issue effluent limitations under the authority of section 301(b)(1)(C). (*Id.* pp. 21-22.) This interpretation, too, cannot be reconciled with the plain language of the statute, the common-sense understanding that Congress intended to provide authority to improve water quality rather than to restrict such efforts, and the fact that all of the decisions cited in the previous paragraph acknowledge the ongoing vitality of section 301(b)(1)(C) after July 1, 1977.

2. The Water Boards' interpretation of Water Code section 13263 is compelled by the Clean Water Act.

a. For federal permits, the Water Code must be construed in a manner consistent with federal law.

The Cities' argument for considering economics during development of permit effluent limitations is based primarily on the reference in Water Code

section 13263, subdivision (a),[4] to section 13241.[5] Even if the Cities were correctly interpreting section 13263 to always require reconsideration of economics in non-federal permits (they are not correct, as explained in section I.A.2.b, *post*, at pp. 18-20), Water Code sections 13372 and 13377 require the Porter-Cologne Act to be construed in a manner consistent with the Clean Water Act. Water Code section 13372 provides, in relevant part:

> This chapter shall be construed to assure consistency with the requirements for state programs implementing the [Clean Water Act]. To the extent other provisions of this division are consistent with the provisions of this chapter and with the requirements for state programs implementing the [Clean Water Act], those provisions shall be applicable to actions and procedures provided for in this chapter. The provisions of this chapter shall prevail over other provisions of this division to the extent of any inconsistency.

The chapter referred to in section 13372 is chapter 5.5 of the Water Code, entitled "Compliance with the [Clean Water Act]." The division referred to is division 7 of the Water Code. Sections 13263 and 13241 are in chapter 4 of division 7 of the Water Code. The provisions of chapter 5.5 therefore prevail over the provisions of chapter 4 in NPDES permitting.

Furthermore, the Legislature declared in Water Code section 13377 that:

> Notwithstanding any other provision of this division, the

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[4] Water Code section 13263, subdivision (a), provides that effluent limits

> . . . shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.

[5] Water Code section 13241 provides, in relevant part:
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: [¶] . . . [¶] (d) Economic considerations.

> state board or the regional boards shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements . . . which apply and ensure compliance with all applicable provisions of the [Clean Water Act] and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

"Waste discharge requirements," as used in section 13377, means federal permits under the Clean Water Act, including NPDES permits. (Wat. Code, § 13374.) The underlined text in the quotation tracks the language of Clean Water Act section 301(b)(1)(C) (33 U.S.C. § 1311(b)(1)(C)), and demonstrates that the Legislature intended that the Water Boards "apply and ensure compliance with" the federal statute precluding consideration of economic factors when developing effluent limitations.

b. Water Code section 13241 analysis is only appropriate during permitting where effluent limitations are designed to achieve a purpose other than implementation of federally-approved water quality standards.

The argument that the Water Boards' interpretation of Water Code section 13263 "effectively struck" words from the statute is without merit. (Opening Brief, p. 10.) The reference to Water Code section 13241 in section 13263 is triggered either when there is no applicable basin plan or federal water quality standard to implement or when a regional board determines an effluent limitation more stringent than the applicable water quality standard is needed. For example, if new scientific evidence shows a need for more stringent limitation of a pesticide, but there has not been time to amend the basin plan, a regional board would consider section 13241 factors when developing more stringent effluent limitations on the pesticide during permitting. Section 13241 factors would also be considered during development of effluent limitations designed to abate a nuisance. This could occur, for instance, where odors emanating from a water body designated for industrial uses not dependent upon

water quality cause a nuisance for adjacent properties even though the beneficial use is not impaired.

The Water Boards' interpretation of Water Code section 13263, subdivision (a), is also a much more reasonable interpretation of the Porter-Cologne Act as a whole than the Cities' assertion that section 13241 factors should be analyzed during the adoption of water quality objective and re-analyzed during every implementation of the objective in a permit. The State Board has consistently found that such reconsideration is inconsistent with law and public policy. This long-standing agency interpretation was most recently explained in a December 5, 2001 order, State Board Order WQ 2001-016. (Exhibit A to Water Boards' Request for Judicial Notice filed herewith.)[6] Previously, the State Board reached a similar conclusion in 1973, 1974, 1977, and 1994. (LAA XIII 3815-24, 3641-62, 3664-92, 3625-39, 3613-23.)

Beginning in 1973, the State Board has consistently harmonized sections 13263 and 13241. The State Board's carefully articulated reasoning was reiterated in a 1994 precedential decision. In that decision, the State Board concluded that an interpretation of 13263 requiring repeated re-analysis of the section 13241 factors:

> would frustrate the implementation of this statutory scheme by having the Regional Board reconsider in detail each time it adopted a waste discharge requirement [each factor]. The magnitude of such task and the piecemeal approach suggested would prevent the administration of an effective and equitable permit program. Further, such an approach is inconsistent with the intent of the drafters of the Porter-Cologne Water Quality Control Act. The Final Report of the Study Panel to the California State Water Resources Control Board, dated March, 1969, contains the following statement with regard to the relationship between basin plans and waste discharge requirements[:] 'If plans have not yet been adopted, the waste

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[6] The specific permits at issue in State Board Order WQ 2001-016 are currently before the First District Court of Appeal.

> discharge requirements would be established on the same basis as water quality control plans ...' [citation omitted]. This statement indicates that the intent of the reference to Section 13241 in Section 13263 is meant to require consideration of the factors listed in Section 13241 at the time of adoption of individual permits only when no Basin Plan has been adopted.

(State Board Order WQ 94-8 (1994 WL 548052, *5), LAA XIII 3819-20.)

The State Board's interpretation is supported by the only reported case concerning application of the section 13241 factors in the permitting context. (*Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 481.) The Court of Appeal also agreed:

> The trial court's construction of Water Code section 13263 would render water quality standards established under section 13241 illusory and would multiply the burden imposed on the regional boards, because each discharger would be entitled to an individualized consideration of the various factors in order to establish water quality standards appropriate for each individual discharger. We reject this construction.

(Slip Op., p.16.)

c. The State Board's long-standing interpretation of state and federal water quality law is entitled to deference.

In *Yamaha*, this Court described two categories of factors to be considered in determining the weight given to an agency interpretation of law: factors "indicating that the agency has a comparative interpretive advantage over the courts," and "that the interpretation in question is probably correct." (*Yamaha, supra*, 19 Cal.4th at p. 12.) Factors in both categories indicate that the State Board's interpretation of Water Code section 13263 should be accorded significant deference. Factors indicating that the State Board has a comparative interpretive advantage are: the State Board's "expertise and technical knowledge" in its role as a quasi-adjudicative appellate body that regularly reviews permitting actions by regional boards (see Wat. Code, § 13320) and the fact that water quality regulation decisions are "entwined with

issues of . . . policy and discretion." (*Yamaha*, *supra*, 19 Cal.4th at p. 12.) Factors indicating the State Board's interpretation is probably correct are: each of the decisions interpreting Water Code section 13263 were "adopted after public notice and comment" and "careful consideration by senior agency officials" (the State Board members themselves); also, the State Board has "consistently maintained the interpretation in question" for 30 years. (*Ibid.*)

Another factor weighing in favor of deference to the State Board's interpretation is that the Legislature amended Water Code section 13263 in 1995 and did not insert language refuting the agency interpretation. (Wat. Code, § 13263 (Historical Notes).) In his opinion concurring with the majority in *Yamaha*, Justice Mosk noted:

> "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it."

(19 Cal.4th at pp. 21-22 (conc. opn. of Mosk, J.) (quoting *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017-18).) Because the State Board had consistently interpreted section 13263 the same way for 22 years when the Legislature amended that statute in 1995, the State Board's interpretation is presumed to be consistent with the underlying legislative intent. (*Yamaha*, *supra*, 19 Cal.4th at p. 22.)

B. It Is Undisputed That Economics must Be Considered When Adopting Water Quality Standards, but the Cities' Procedural Challenges to the Basin Plan Cannot Be Asserted in a Permit Challenge Action and Cannot Be Evaluated on the Record Before the Court.

It is undisputed that economics are properly considered when water quality standards are adopted. (Wat. Code, § 13241, subd. (d).) The Cities' attempt to force the Regional Board to perform section 13241 analysis again during permitting proceedings is based on the unproven allegation that economics were not considered when the relevant water quality standards were

adopted in regulatory proceedings by the Water Boards in 1994. (LAA IV 0988.) The argument is not well taken. The record of the water quality standards adoption is not before the Court. Moreover, a collateral attack on the regulatory basis for permit conditions which is predicated on alleged procedural defects in the adoption of water quality standards is improper. These attacks would erode the certainty inherent in regulations duly approved by the Office of Administrative Law and EPA. They would also leave unprotected and unheard the interests of stakeholders who participated in the adoption of the water quality regulation, but who cannot participate in every permit action in which the regulation might be collaterally attacked. There are many legal obstacles to the Cities' challenge to the water quality standards, and any one of them defeats their claims.

1. As a matter of federal law, EPA-approved water quality standards must be implemented in any NPDES permit.

The narrative toxicity objective that the Cities allege was adopted without consideration of economics and other factors was adopted by the Regional Board on June 13, 1994, approved by the State Board on November 17, 1994, approved by the Office of Administrative Law on February 23, 1995, and approved by EPA on February 15, 2002. (LAA IV 0988; Exhibit "B" to Water Boards' Request for Judicial Notice (granted on March 15, 2002).) When EPA approved the narrative toxicity objective, it "shall thereafter be the water quality standard for the applicable waters of that State." (33 U.S.C. § 1313(c)(3).) In addition to requiring the achievement of any more stringent limitation established pursuant to state law, Clean Water Act section 301(b)(1)(C) (33 U.S.C. § 1311(b)(1)(C)) mandates dischargers to achieve any more stringent limitation ". . . required to implement any applicable water quality standard established pursuant to this chapter." In short, the Cities must successfully challenge EPA's approval in federal court to avoid regulation under the applicable water quality standard. (33 U.S.C. § 1365(a)(2) (allowing

citizen suits against EPA for failure to perform any act or duty under the Clean Water Act).)

2. The Basin Plan adoption proceedings are not part of the administrative record for this action.

Throughout their Opening Brief, the Cities assert "the administrative record did not contain any evidence demonstrating that the Regional Board took these [Water Code section 13241] factors into consideration when adopting the water quality objectives on which the Cities' permit requirements were based." (Opening Brief, p. 11 (underlining deleted); see also pp. 10, 16-17 and 26-27.) The Cities even incorporated allegations about what was considered during the adoption of water quality standards into their statement of the first two issues in this case. Their claims are unsupportable at best, because the proceedings regarding the adoption of the water quality standards are not part of the record before the Court. The Cities therefore cannot prevail on their claims about what was or was not considered during the water quality standards adoption.

The only support the Cities offer is a 2003 letter to the Court of Appeal from Environmental Defense Sciences. (Opening Brief, p. 11.) The Cities invite the Court to base its decision about whether the Regional Board's water quality standards comply with the law on the extra-record, unsworn and hearsay statement of a witness whose affiliation, interest, and qualifications are unknown. Only evidence in the administrative record may considered in administrative mandamus actions, with limited exceptions not invoked by the Cities or applicable in this case. (Code Civ. Proc., § 1094.5, subd. (c); *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559, 578.) The Water Boards object to this evidence and it should not be considered.

3. The Cities' challenges to the adoption of the water quality standards are time-barred and are improper in the context of a permit-challenge action.

Without any proof, the Cities claim essentially that the water quality standards implemented in their permits were adopted in a procedurally defective manner, namely, that the proper factors and impacts were not considered. (See, e.g., Opening Brief, p. 11.) The Cities neither allege that the water quality standards are unconstitutional nor that they exceed the scope of authority granted by the Legislature, but only that factors should have been considered, which would not necessarily have resulted in different regulation.

The Cities could have challenged the procedures used by the Regional Board to adopt water quality standards in a timely-filed action for traditional mandamus under Code of Civil Procedure section 1085. They may not, though, raise those challenges in an appeal of their NPDES permits under Code of Civil Procedure section 1094.5 filed almost five years after the water quality standards were approved by the Office of Administrative Law on February 23, 1995. (LAA IV 0988.) Even the catchall four-year statute of limitations in Code of Civil Procedure section 343 ran on February 23, 1999, nine months before the Cities filed their petitions in this case.

The Cities, however, are not without a remedy for their complaints about both the designated uses and the water quality standards set by the Regional Board. These issues may properly be raised during the triennial review process required by Clean Water Act section 303(c)(1). (33 U.S.C. § 1313(c)(1).)

C. Planning and Reporting Requirements of the Clean Water Act Directing Consideration of Economic Factors Do Not Establish a Requirement That Economic Factors Be Considered at the Permitting Stage.

The Cities argue at length that economic factors are appropriately considered when preparing areawide waste treatment management plans under Clean Water Act section 208 (33 U.S.C. § 1288), when preparing state reports

on water quality under section 305(b) (33 U.S.C. § 1315(b)) and in a state Continuing Planning Process under section 303(e) (which does not actually mention consideration of economic impacts apart from a requirement to incorporate the elements of any section 208 plan). (33 U.S.C. § 1313(e).) The Cities argue that "references to cost and economics occur approximately 320 times [in the Clean Water Act]!" (Opening Brief, p. 23 (underlining deleted).) While these citations lend support to the undisputed point that Congress expressly directed consideration of economic factors in many parts of the Clean Water Act, they do nothing to advance the Cities' argument that economics should be a factor considered in the development of specific NPDES permit effluent limitations. When faced with a very similar argument regarding consideration of costs under the Clean Air Act ("CAA"), the United States Supreme Court "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." (*Whitman v. American Trucking Associations, Inc.* (2001) 531 U.S. 457, 467.)

Significantly, like the Cities' claims regarding the adoption of the water quality standards, arguments about the validity of the applicable section 208 plan (33 U.S.C. § 1288) and the state's Continuing Planning Process under section 303(e) (33 U.S.C. § 1313(e)) cannot even be evaluated because those documents are absent from the record. Furthermore, the Cities have not alleged that they exhausted their administrative remedies on these claims because, in fact, they were never raised to either the Regional Board or to the State Board. As such, the Cities are barred from asserting these claims now. (*United States v. Superior Court* (1941) 19 Cal.2d 189, 194.)

Although the Cities have described these sections as the "foundational requirements" of the Clean Water Act (Opening Brief, p. 17), there is no authority suggesting that these "foundational requirements" impose obligations

during permitting that would mandate consideration of economic factors. The section 208 planning process, which has largely been subsumed by other planning processes in the development of the Basin Plan, is primarily directed at plans to identify, coordinate, and improve the needs and facilities for POTWs and nonpoint sources. (33 U.S.C. § 1288(b); see also Rodgers, Environmental Law: Air and Water (1986) §§ 4.9, 4.21 ("EPA administered the Section 303(e) [statewide planning] provisions with gusto, effectively using them to replace Section 208 areawide planning"), p. 4.)

Section 208 provides that no NPDES permit may be issued "which is in conflict with a plan approved under subsection (b) of this section." The Cities, however, have not even alleged, much less proven, any conflict between the permits issued by the Regional Board and any section 208 plan. Furthermore, they cannot identify any authority that would require a regional board to refuse to "carry out the objective of [the Clean Water Act]" by achieving state water quality standards as required by section 301(b) (33 U.S.C. § 1311(b)) because of an alleged deficiency in a section 208 plan.

The Cities also allege that the State Board's reports to EPA on water quality under section 305(b) (33 U.S.C. § 1315(b)) do not adequately assess environmental, economic and social impacts associated with achieving water quality criteria. Again, they fail to support the idea that consideration of these factors is part of the permitting process. (Opening Brief, p. 18.) The Clean Water Act does not require that the state or EPA actually take any action based upon the report's estimates. (*Natural Resources Defense Council v. United States Environmental Protection Agency* (9th Cir. 1990) 915 F.2d 1314, 1322 ("There are other provisions in the Clean Water Act which require the gathering of information but which do not necessarily require immediate action on the basis of the information. *See, e.g.*, CWA § 305, 33 U.S.C. § 1315 . . . .").)

The only objection the Cities raise about the Water Boards' Continuing

Planning Process under section 303(e) (33 U.S.C. § 1313(e)) is that the Water Boards did not make a showing demonstrating that the State had complied with each statutory requirement. (Opening Brief, p. 19.) The Cities are the parties challenging their permits, however, and they have the burden of proving any defects they alleged. No provision of state or federal law requires the Regional Board to make the showing the Cities mention. The Cities may believe that they have a right to discharge pollution, and that the burden is on the Regional Board to justify any infringement of that "right," but the law has set up the opposite dynamic: "All discharges of waste into waters of the state are privileges, not rights." (Wat. Code, § 13263, subd. (g).)

The validity of the planning and reporting documents attacked by the Cities in their Opening Brief ultimately has no bearing on the validity of the Water Boards' manner of issuing NPDES permits. The Cities are merely alleging factual defects without tethering those factual allegations to a viable, legal permitting challenge. As the Court of Appeal correctly observed, the requirements of Clean Water Act sections for planning and reporting of economic impacts "do not indicate that the permitting authority must consider the cost of compliance with effluent limitations when establishing effluent limitations in a permit." (Slip Op., p. 15.)

D. Permitting Proceedings Before the Regional Board Are Not the Proper Forum for Raising Alleged Defects in Statewide Planning and Reporting Documents.

To the extent that the Cities perceive deficiencies in documents created under sections 208, 305(b), or 303(d) (33 U.S.C. § 1288, 1315(b), 1313(e)), those documents may be challenged directly in a timely-filed action. (See, e.g., BAA XI 3229-3232 (superior court proceedings challenging California's section 305(b) report); 3234-57 (complaint in United States District Court for the Eastern District of California challenging California's section 305(b) report and section 208 plan).) They may not be assailed indirectly, however, in the

context of this challenge to the Cities' NPDES permits. Furthermore, the Cities have not exhausted their administrative remedies with respect to these claims. (*United States v. Superior Court*, *supra*, 19 Cal.2d at p. 194.) They should not be allowed to proceed with claims against the validity of these documents until the Cities have presented their arguments to the appropriate agencies and allowed an appropriate record to be developed.

E. Clean Water Act Provisions Addressing Cost-effective Treatment Technologies for POTWs Are Unrelated to the Derivation of Water Quality-Based Effluent Limitations for POTWs During the Permitting Process.

1. The Clean Water Act does not make cost-effectiveness the benchmark for regulation of POTWs.

The Cities maintain that " . . . Congress treated POTWs differently [in the Clean Water Act] than industries or other dischargers." (Opening Brief, p. 20.) In many respects, POTWs are treated differently under the Clean Water Act. Most significantly, the Clean Water Act provided opportunities for POTWs to apply for very generous grants of federal money to upgrade their treatment facilities in order to comply with the statute. (33 U.S.C. §§ 1281(a).) Because the grantees would be spending federal money, and not their own, Congress imposed myriad restrictions on the types of projects that could be funded with federal grant money.

One very sensible restriction was the requirement that grant money be used cost-effectively. (33 U.S.C. § 1297.) Other restrictions include a requirement to use materials made in the United States (33 U.S.C. § 1295) and prohibitions on the use of grant money for maintenance, replacement or repair of certain pilot projects. (33 U.S.C. § 1300.) These restrictions are evidence of a congressional intent to control how federal money is spent. They do not evince a congressional intent to prohibit EPA or states from requiring POTWs to comply with water quality-based effluent limitations.

The Cities also assert that EPA regulations contemplate a "review of

feasibility at the wastewater permitting stage" to assess whether effluent limitations based on Best Management Practices should be used instead of numerical effluent limitations. (Opening Brief, p. 22 (citing 40 C.F.R. § 122.44(k)(3) (2003).) The EPA regulation, at most, simply adds another regulatory tool for the permitting agency. In this case, however, there has been no demonstration that the calculation of a numeric effluent limitation is infeasible.

2. Congress and EPA have explicitly stated that POTWs must comply with section 301(b)(1)(C).

Implicit in the Cities' argument that "discharge requirements" for POTWs must consider practicability and cost-effectiveness is the assertion that POTWs need not comply with Clean Water Act section 301(b)(1)(C)'s requirement that dischargers achieve effluent limitations necessary to achieve water quality standards. The Cities claim that the EPA regulation implementing section 301(b)(1)(C) is not applicable to POTWs because it uses the phrase "effluent limitations guidelines or standards," which, according to the Cities, is a subtle indication that 40 Code of Federal Regulations part 122.44(d)(1) (2003) is applicable only to industrial discharges. This argument is belied by explicit statements from Congress and EPA that POTWs must comply with water quality-based effluent limitations. It is also based on incorrect textual analysis.

Congress intended that section 301(b)(1)(C) apply to POTWs. Subsection (i) of section 301, describing when municipalities may apply for extensions of time to comply with deadlines, begins: "Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section . . . ." (33 U.S.C. § 1311(i).)

When promulgating 40 Code of Federal Regulations part 122.44(d)(1) (2003), EPA noted in its preamble that it "expects that with few exceptions, all

major POTWs and major industrial discharges will need to be evaluated to determine whether they have a reasonable potential to cause excursions." (54 Fed.Reg. at 23873.) Several years later, EPA issued its "Whole Effluent Toxicity (WET) Control Policy" and reaffirmed that part 122.44(d)(1) applies to POTWs. (See, 59 Fed.Reg. 37494 (Jul. 22, 1994) (providing notice of policy); WET Policy available at <http://www.epa.gov/npdes/pubs/owm 0117.pdf>.) Specifically, the policy states that "[t]he requirements of the water quality permitting regulations apply to all dischargers, including POTWs." (WET policy at p. 3, 14-15 ("reaffirms EPA's longstanding policy"); see also 59 Fed.Reg. 37495 (Jul. 22, 1994).) Thus, EPA, the author of the regulations that form the basis of the Cities' argument, unequivocally takes the position that POTWs are subject to part 122.44(d)(1).

Indeed, to grant POTWs an exemption from water quality-based effluent limitations would be to guarantee that the goals of the Clean Water Act, such as eliminating the discharges of pollutants (33 U.S.C. § 1251(a)(1)), would never be realized because POTWs account for a tremendous volume of effluent. (See BAA VII 2096 ("When the [Los Angeles] river is not carrying stormwater, the flow in the river consists mostly of treated wastewater . . . ."); XII 3527.)

3. Contrary to the Cities' arguments, Congress did not intend the Clean Water Act pretreatment program to be the sole means of addressing toxic pollutant discharge from POTWs.

The Cities argue that the existence of Clean Water Act provisions requiring POTWs to establish pre-treatment programs controlling the introduction of certain pollutants into the POTW is evidence of a congressional intent to exempt POTWs from effluent limitations for toxic pollutants. (Opening Brief, pp. 21-22.) The Cities emphasize language in title 33 United States Code section 1317(b) directing POTWs to adopt pretreatment standards preventing the discharge of "pollutants not susceptible to treatment by such treatment works, or which would interfere with operation of such treatment

works." (*Ibid.*) Further down the same passage, however, Congress provided that a POTW did not have to adopt pretreatment standards if it can adequately remove the toxic pollutant at issue. (33 U.S.C. § 1317(b)(1).) Congress therefore recognized that POTWs can be built to effectively remove these pollutants.

The Cities' interpretation would frustrate congressional intent because only industrial sources are subject to pretreatment programs. Many toxic pollutants are introduced into the POTW from households and other non-industrial sources that are not subject to the pretreatment program. (BAA XV 4410:3-5 (Burbank's Memorandum of Points and Authorities in Support of Writ of Mandate, "Unlike industrial discharges into Burbank-owned and operated sewer systems, discharges from homes, which are the primary source of many of the chemicals found in wastewater, are unregulated.")) The POTW is the only entity subject to regulation under the Clean Water Act in a position to remove the pollutants. It is literally the "end of the line" before discharge into surface waters. Furthermore, Congress cannot have intended to give POTWs a total exemption from treating toxic pollutants because to do so would thoroughly frustrate two of the stated goals of the Clean Water Act: "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," and "the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." (33 U.S.C. § 1251(a)(1), (3).)

II.
THE REGIONAL BOARD'S ISSUANCE OF WASTEWATER DISCHARGE PERMITS IS EXEMPT FROM THE EIR REQUIREMENTS OF CEQA; MATTERS THAT WOULD BE CONTAINED IN AN EIR, SUCH AS REGULATORY ALTERNATIVES OR ENVIRONMENTAL IMPACTS, NEED NOT BE CONSIDERED.

The dispute between the parties about the applicability of CEQA to the Regional Board's issuance of NPDES permits concerns the meaning of Water Code section 13389. Water Code section 13389 provides:

> Neither 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 prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the Federal Water Pollution Control Act or acts amendatory thereof or supplementary thereto.

The Water Boards contend, and the Court of Appeal agreed, that this exemption from the obligation to prepare CEQA environmental documents such as EIRs or negative declarations is effectively a complete exemption from CEQA. (Slip Op., pp. 18-21.) The Cities assert that even though the Regional Board is exempt from chapter 3 of CEQA when issuing NPDES permits, it still "has substantive obligations under Chapters 1 and 2.6 of CEQA to identify and evaluate the cumulative impacts, feasible alternatives, and mitigation measures for requirements imposed in discharge permits before issuing them." (Opening Brief, p. 30.) The Cities' construction of section 13389 is incorrect, however, because it suggests either a consideration of matters without a record, making public and judicial review meaningless, or would require the Regional Board to create the functional equivalent of an EIR, making section 13389 an illusory exemption.

A. Water Code Section 13389 Exempts the Issuance of NPDES Permits from Compliance with CEQA.

1. Mandatory consideration of CEQA policies is not possible where the Regional Board is exempted from the obligation to create an environmental review document.

In response to the Cities' arguments for consideration of CEQA policies during permitting, the Court of Appeal explained that:

> Judicial review of a public agency's consideration of significant environmental effects, alternatives to the project, and mitigation measures would be meaningless without a record showing the environmental effects, alternatives, and mitigation measures that the agency considered.

(Slip Op., p. 20.) Similarly, the public information purpose of CEQA would not be served without an environmental document describing the agency's consideration of these matters. (See Pub. Resources Code, § 21061.) The logic of this interpretation is compelling. The Water Code section 13389 exemption from the obligation to prepare CEQA environmental documents can only be interpreted as a complete exemption from CEQA.

The Cities cite cases in which the agency was exempt from the preparation of EIRs only because it prepares documents that are functionally equivalent to an EIR. These decisions are inapposite. In *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, the Timber Harvesting Plans at issue were not exempted from CEQA by the Legislature, but instead were exempted by the Secretary of Resources as a certified regulatory program under Public Resources Code section 21080.5. (7 Cal.4th at p. 1230.) A regulatory program cannot be certified by the Secretary of Resources unless the program requires, among other things, that project descriptions include alternatives and mitigation measures. (*Ibid.* (citing Pub. Resources Code, § 21080.5 subd. (d)(3).)) Thus, the exemption from strict compliance with the procedural requirement of EIR preparation is predicated upon the fact that the certified regulatory program would require description of the same information that would be contained in

an EIR.

The Water Boards' NPDES program, in contrast to the Timber Harvesting Plan program discussed in *Sierra Club*, was exempted from the requirement to prepare an EIR by the Legislature. None of the certification requirements set forth in Public Resources Code section 21080.5 are mentioned in Water Code section 13389. In other words, whereas the Secretary of Resources may grant exemptions under the Public Resources Code contingent upon a showing of certain program characteristics, the Water Code section 13389 exemption is without contingency.

The Cities argue that the NPDES permit program should be turned into the "functional equivalent" of a CEQA review. (Opening Brief, p. 31 (arguing that Regional Board should include discussion of cumulative impacts, feasible alternatives and mitigation measures in permit findings.)[7] Doing so, however, would render the exemption in Water Code section 13389 illusory: the "exemption" would not relieve any regulatory burden and would be unnecessary because the Water Boards could have applied to have the NPDES program certified by the Secretary of Resources without section 13389. (See, e.g., Cal. Code Regs., tit. 14, § 15251, subd. (g) (certifying Water Boards' basin planning program).)

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[7] The Cities also rely on *In the Matter of the Petition of Pacific Water Conditioning Association, Inc.*, State Board Order No. WQ 77-16, 1977 Cal. ENV LEXIS 59 (1977), but the portion of that order that they quote illustrates why CEQA analysis was appropriate in that case but not in the case of the Cities' NPDES permits. The State Board found that "where no Basin Plan EIR has been prepared" findings on potential mitigation measures are appropriate. (*Id.* at p. *23.) The Water Boards' basin planning activities are conducted as a certified regulatory program in compliance with CEQA. (Cal. Code Regs., tit. 14, § 15251, subd. (g).) The Cities do not allege that the Regional Board's Basin Plan was not adopted in compliance with CEQA.

2. State Board decisions and regulations require only that the Water Boards review other agencies' CEQA documents when they exist.

The two State Board decisions cited by the Cities do not, as the Cities imply, require that regional boards independently analyze alternatives or proposed mitigation for effluent limitations in NPDES permits. The State Board's ruling in *In the Matter of the Petition of Robert and Frederick Kirtlan*, State Board Order No. WQ 75-8, 1975 Cal. ENV LEXIS 45 (1975) (Exhibit F to Declaration of Nicole Granquist in Support of Burbank's Motion Requesting Judicial Notice (May 24, 2002)) was summarized in *In the Matter of the Petition of the Sierra Club, San Diego Chapter*, State Board Order No. WQ 84-7, 1984 Cal. ENV LEXIS 13 (1984) (Exhibit E to Declaration of Nicole Granquist in Support of Burbank's Motion Requesting Judicial Notice (May 24, 2002)) as follows: "where an EIR has been prepared by another agency for a project requiring an NPDES permit the Regional Board should consider that EIR." (*In the Matter of the Petition of the Sierra Club, supra*, p.23.) Nothing in either State Board order indicates that the Water Boards have ever decided that development of effluent limitations must be preceded by CEQA analysis.

B. NPDES Permits Issued by the Regional Board are Exempt from CEQA to Parallel the Clean Water Act Exemption from NEPA.

Title 33 United States Code section 1371(c)(1) provides that actions taken by EPA under the Clean Water Act are generally exempt from the environmental review requirements of the National Environmental Policy Act of 1969 ("NEPA"). (42 U.S.C. §§ 4321 et seq.) As one federal court explained, "the clear purpose of the exemption is to avoid delays, caused by preparation of lengthy EIS's, in implementing the Water Act's goals." (*Pacific Legal Foundation v. Quarles* (C.D. Cal. 1977) 440 F.Supp 316, 320-21 & fn. 2 (Conference Report states that "If the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would

be greatly impeded. [Citation].")

The Water Code section 13389 exemption from CEQA was enacted to ensure that federal permits were not delayed by lengthy environmental review. "It is fairly apparent that . . . Water Code section 13389 was meant to parallel the exemption for the issuance of NPDES permits from the requirements of NEPA found in section 1371 of the federal act." (*Pacific Water Conditioning Assoc. Inc. v. City of Riverside* (1977) 73 Cal.App.3d 546, 556 (concerning cease and desist order implementing permit).) The Cities' claim that NPDES permits issuance should be subjected to CEQA review should be rejected because to do so would frustrate the intent of the Legislature.

C. Sections 208, 303 and 305 of the Clean Water Act Do Not Require the Regional Boards to Consider Regulatory Alternatives or Environmental Impacts at the Permitting Stage.

The Cities' arguments regarding an alleged requirement to consider environmental impacts or regulatory alternatives at the permitting stage fail for the same reasons as their claims that economics should be considered during permitting. Sections 208, 303 and 305 of the Clean Water Act pertain to planning and reporting, not to permitting. The record does not contain the necessary documents to evaluate these allegations, and the Cities have not exhausted their administrative remedies.

D. EPA and the State Board have Adopted Regulations Defining When Effluent Limitations Are "Necessary"

The Clean Water Act section 301(b)(1)(C) and Water Code section 13377 requirement that NPDES permits include any effluent limitations "necessary" to meet water quality standards has been interpreted by the Cities to mean that the Water Boards must make a "showing that effluent limits will have a resultant environmental benefit and, thus, are 'necessary.'" (Opening

Brief, p. 10.)[8] EPA, however, has promulgated regulations defining how to determine when effluent limitations are "necessary," and the showing urged by the Cities is not required.

Under a duly-adopted EPA regulation, NPDES permits must contain effluent limitations for all pollutants which:

> . . . are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . . .

(40 C.F.R. § 122.44(d)(1)(i) (2003).) Thus, an effluent limitation is justified when a pollutant may potentially contribute to an exceedance of a water quality standard. (*American Iron and Steel Institute v. United States Environmental Protection Agency* (D.C. Cir. 1997) 115 F.3d 979, 1000 (Rejecting argument that "a precise causal connection between the particular discharge and the relevant exceedance" must be shown because all that is required is a reasonable possibility that a discharge is contributing to the exceedance).)

The State Board has also promulgated regulations providing detailed protocols for determining when water quality-based effluent limitations are "necessary." (Cal. Code Regs., tit. 23, § 2914.) The Cities misinterpret Water Code section 13263.6 to prohibit the use of narrative objectives to set numerical effluent limits in POTW permits. (Opening Brief, p. 40.) Section 13263.6 describes when numerical effluent limitations <u>must</u> be imposed, but does not restrict their use in other circumstances. The Cities' interpretation conflicts with both the plain meaning of the statute and the explicit requirements of EPA

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[8] The Cities elsewhere assert that "the [Clean Water Act] requires a showing that effluent limits will have a resultant environmental benefit and are "necessary" prior to imposition." (Opening Brief, p. 23.) The Cities cite section 303(d)(1)(C) (33 U.S.C.§ 1313(d)(1)(C)) in support of this claim. The phrases "environmental benefit" and "effluent limits" do not appear in section 303(d)(1)(C). Indeed, section 303(d)(1)(C) has nothing to do with setting effluent limitations only when justified by environmental benefits.

and State Board regulations. (40 C.F.R. § 122.44(d)(1)(i) (2003); Cal. Code Regs., tit. 23, § 2914.)

III.
WASTEWATER DISCHARGE PERMITS CANNOT CONTAIN A COMPLIANCE SCHEDULE UNLESS THE WATER QUALITY STANDARD BEING IMPLEMENTED SPECIFICALLY AUTHORIZES DELAYED COMPLIANCE.

When issuing the Cities' permits, the Regional Board recognized that immediate compliance might not be possible. Early tentative drafts of the Los Angeles – Glendale and Burbank permits actually included compliance schedules. (LAA VI 1703-06; BAA V 1298 – 1303 .) A compliance schedule provides an interim effluent limitation that is less stringent than the effluent limitation the Regional Board determined necessary to comply with the Clean Water Act. Having compliance schedules included within the permits is important to the Cities because then compliance with the schedules constitutes compliance with the permits, and, therefore, compliance with the Clean Water Act.

Compliance schedules were removed from the final permits, and placed in separate time schedule orders, because the Regional Board received the following comments from EPA:

> The tentative permit also contains interim effluent limitations for several pollutants of concern, excluding ammonia, where existing data indicate that the permittee cannot achieve immediate compliance with proposed final effluent limitations. In situations such as this, where the use of compliance schedules is not authorized, the practical alternative is to issue an enforcement order that includes both interim effluent limitations and a compliance schedule.

(LAA VII 1896, 1898; see also BAA V 1471-72.) EPA identified the inclusion of compliance schedules as an "inconsistency" with the Clean Water Act. (LAA VII 1896, 1898; BAA V 1471.) If not corrected, EPA warned it would

exercise its right to object to the final permits under 40 Code of Federal Regulations part 123.44 and a Memorandum of Agreement between EPA and the State. (*Ibid.*) EPA's objection could ultimately result in EPA taking over the issuance of the permits and possibly revocation of the state's permitting program. (33 U.S.C. § 1342(c)(3); 40 C.F.R. §§ 123.44, 123.63 (2003).) The compliance schedules were therefore removed from the final permits. (LAA VII 1900; BAA V 1473.) Maintaining the compliance schedule in defiance of EPA's request would have been futile.[9]

As EPA suggested, the Regional Board issued enforcement orders with interim effluent limitations and compliance schedules. (LAA X 2971-77, 2978-85; BAA VII 1957-76.) The Cities incorrectly declare that they "would have been subject to hundreds of thousands of dollars in mandatory penalties . . . ." had the superior court not granted a stay of their effluent limitations. (Opening Brief, p. 35.) As long as the Cities comply with the terms of the time schedule orders, they are not subject to mandatory penalties. (Wat. Code, § 13385, subd. (i).)

A. Section 301(b)(1)(C) of the Clean Water Act prohibits compliance schedules for water quality-based effluent limitations unless the water quality standard being implemented specifically provides for compliance schedules.

The compliance schedules requested by the Cities would violate the Clean Water Act section 301(b)(1)(C) requirement that any more stringent effluent limitations needed to achieve water quality standards shall be achieved by no later than July 1, 1977. (33 U.S.C. § 1311(b)(1)(C).) The EPA

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[9] Since the Cities' permits were issued in 1998, several regulatory events have provided new authority for compliance schedules. On January 30, 2003, the Regional Board adopted a Basin Plan amendment authorizing compliance schedules for new or newly interpreted water quality standards. (Cal. Code Regs., tit. 23, § 3939.3.) This authority supplements the authority to issue compliance schedules for toxic pollutants in the California Toxics Rule. (40 C.F.R. § 131.38(e) (2003).)

Environmental Appeals Board ruled in *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, 1990 WL 324290 (LAA XV 4366 – 4401), that compliance schedules for water quality-based effluent limits are impermissible unless the water quality standard that is the basis for the effluent limitation specifically allows for compliance schedules. The Administrator opined:

> In my opinion, the only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance.

(*Id.* at p. 5.) The Administrator's decision in *Star-Kist Caribe* has been repeatedly affirmed, most recently in *In re: City of Moscow, Idaho*, NPDES Appeal No. 00-10, 2001 WL 988721. Whether compliance schedules were permissible for the Cities' permits, then, depends on whether the text of the water quality standards can be construed as authorizing a schedule of compliance.

The Porter-Cologne Act and the Clean Water Act contemplate the use of compliance schedules. All of the authorities cited by the Cities fall into this general category. However, the reference to optional compliance schedules in Water Code section 13263, subdivision (c), and the Basin Plan's comment that compliance schedules are generally included in NPDES permits (LAA IV 1107) are not found in the water quality standard itself or in the regulations implementing the particular standard, as required by *Star-Kist Caribe*. When appropriate, the Water Boards are not reluctant to include compliance schedules in NPDES permits – such as for ammonia in the Cities' permits. They cannot, however, without explicit authorizing language for a specific standard, include compliance schedules that would impermissibly extend Congress' July 1, 1977 deadline. (33 U.S.C. § 1311(b)(1)(C).)

The decision reached by the Administrator in *Star-Kist Caribe* was followed by the Water Boards and EPA, and was relied upon by the Court of

Appeal. The Cities describe *Star-Kist Caribe* in harsh terms as a "tortured interpretation . . . [that] violates every established rule of statutory construction." (Opening Brief, p. 37, fn. 14.) The Cities' characterization notwithstanding, the Administrator's interpretation of the statute is correct.

B. EPA's decision that the Cities' Permits may not include Compliance Schedules is Entitled to Deference.

If the Court finds that section 301(b)(1)(C) is ambiguous regarding the availability of compliance schedules for post-1977 water quality based effluent limits, EPA's interpretation is entitled to deference. (*Chevron, U.S.A. v. NRDC, supra*, 467 U.S. at pp. 842-43.) Generally, when the statute is silent or ambiguous, EPA's interpretation of the statute is entitled to deference if it is reasonable. (*Id.* at pp. 843-45.) If Congress delegated authority to the agency to "make rules carrying the force of law," agency implementation of a statutory provision is entitled to *Chevron* deference when exercising that authority. (*United States v. Mead Corp.* (2001) 533 U.S. 218, 226-27.) Congress entrusted EPA with enforcement and interpretation of the Clean Water Act. (33 U.S.C. § 1251(d), 1342(a).) At a minimum, EPA's determination that compliance schedules are not allowed in the Cities' permits should be accorded a high degree of respect because of its persuasiveness. (*Mead, supra*, 533 U.S. at p. 235 (citing *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140.)

C. The Cities' Argument That Water Quality Standards must Contain Allowances for Compliance Schedules Is Without Merit.

The Cities also collaterally attack the water quality standards in the Basin Plan by alleging that the Regional Board was required to include allowances for compliance schedules in each water quality standard that it adopts or revises. (Opening Brief, p. 36 (citing Wat. Code, § 13242; 33 U.S.C. § 1313(e)(3)(F).) These claims, like the others against the Basin Plan, are barred by the statute of limitations and doctrine of exhaustion of administrative remedies.

Water Code section 13242 provides that programs for implementation

of water quality standards "shall include . . . [¶] (b) A time schedule for the actions to be taken." The type of time schedule discussed in section 13242 is not the same as an allowance for delayed compliance with the water quality standard as described in *Star-Kist Caribe*. A permissible time schedule under the statute could mean a great many things, even that all permits issued after the effective date of the standard shall require immediate compliance. The broad language of section 13242, subdivision (b), cannot be reasonably construed to require allowance for delayed compliance with every single water quality standard.

Clean Water Act section 303(e)(3)(F) similarly cannot reasonably be read to require all water quality standards to allow delayed compliance or to prohibit agencies from requiring immediate compliance.

There are strong policy concerns that weigh against fashioning the rule requested by the Cities. The Water Boards may need to adopt and enforce new water quality standards immediately to protect public health or abate a nuisance. The Administrator recognized in *Star-Kist Caribe* that a state may have "elected not to include the necessary enabling language in its water quality standards . . . ." (*Star-Kist Caribe*, *supra*, at p. 11.) The Cities' arguments, therefore, fail on both legal and policy grounds.

IV.
THE NARRATIVE TOXICITY OBJECTIVE DOES NOT VIOLATE THE CODE OF FEDERAL REGULATIONS

Like so many of the other arguments they have asserted, the Cities' challenge to the narrative toxicity objective in the Basin Plan was untimely, and they did not exhaust their administrative remedies by presenting their arguments to the Water Boards at the administrative level. The superior court adopted the Cities' arguments and ruled that the narrative toxicity objective "violates 40 C.F.R. § 131.11(a)(2)." (LAA XVII 4998:26-27; BAA XII 3391:28 – 3392:1.) The Water Boards successfully appealed this ruling, but explicitly did not

appeal the superior court's separate ruling that the Regional Board did not make adequate findings supporting the derivation of numeric effluent limits from the narrative toxicity objective. (See Appellants' Opening Brief (Burbank Case), pp. 9, 41, fn. 18.)

The narrative toxicity objective is a water quality standard set forth in the Regional Board's Basin Plan.[10] Its purpose is to regulate toxic pollutants that are not specifically listed in the Basin Plan or that have not yet been identified as a problem in a discharger's waste stream. (LAA IV 1081-82.) It implements the express national policy prohibiting toxic pollutants in toxic amounts. (33 U.S.C. § 1251(a)(3).)

In their closing briefs on the writ of mandate proceedings below, the Cities for the first time alleged that the narrative toxicity objective itself violated 40 Code of Federal Regulations part 131.11(a)(2) (2003). Part 131.11(a)(2) provides that, "[w]here a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants . . . ." This information may either be included in the water quality standard or in other documents generated in response to other EPA regulations. (*Ibid.*)

In a February 15, 2002, letter to the State Board, EPA interpreted its own regulation and rendered the opinion that the Regional Board's narrative toxicity

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[10] When the Cities' permits were issued in 1998, toxic pollutants had to be regulated under the narrative water quality standard for toxicity because the Basin Plan did not contain specific numerical standards for each pollutant. (LAA VIII 2194, 2288-89, IV 1081-82; BAA VI 1548, IV 0962-63.) On May 18, 2000, EPA promulgated the California Toxics Rule (40 C.F.R. § 131.38 (2003)), which provides numerical water quality standards for most of the pollutants at issue in this case. (LAA XIV 4138– XV 4230.) The State Board adopted a formal rule setting forth specific protocols for issuing NPDES permits in accordance with the California Toxics Rule that became effective on April 28, 2000. (Cal. Code Regs., tit. 23, § 2914; LAA XV 4232– 4313.)

objective does not violate part 131.11. (Exhibit "B" to Water Boards' Request for Judicial Notice, pp. 5-6 (granted on March 15, 2002).) EPA analyzed the text of the narrative toxicity objective and the recently promulgated State Implementation Policy and concluded that:

> All of this information, in conjunction with the regulations at 40 C.F.R. § 122.44(d)(1)(vi), provides sufficient detail for the regulation of discharges to satisfy 40 C.F.R. § 131.11(a)(2).

(*Id.* at p. 6.) 40 Code of Federal Regulations part 122.44(d)(1)(vii) (2003) describes how to interpret a narrative water quality standard. The State Board has promulgated California Code of Regulations, title 23, section 2235.2, which instructs that all NPDES permits issued in California "shall be issued and administered in accordance with the currently applicable federal regulations for the [NPDES] program." Part 122.44(d)(1)(vii) is a currently applicable federal regulation for the NPDES program, and therefore the Water Boards have provided information that must be followed under California Code of Regulations, title 23, section 2235.2. EPA's position on the interpretation of its own regulations is entitled to deference. (*Chevron, U.S.A. v. NRDC, supra*, 467 U.S. at pp. 842-45.)

Despite the substantial regulatory information provided by the state and federal governments about how the narrative toxicity objective will be implemented, the Cities still claim there is not enough information to satisfy the requirements of 40 Code of Federal Regulations part 131.11(a)(2) (2003). The Cities' argument, however, is not directed at a lack of regulatory information in compliance with part 131.11(a)(2), but instead is directed at the adequacy of the findings supporting the permit effluent limitations: "Nothing in the Cities' permits explained how the 11 ppb limit for copper was derived or why this particular limit was necessary . . . ." (Opening Brief, p. 43.) Because the adequacy of the findings is not at issue on appeal, the Cities arguments are misdirected.

The Cities also argue that the outcome of their federal challenge to the narrative toxicity objective should be dispositive of this issue. (Opening Brief, p. 44 .) Given that EPA's February 15, 2002, letter finding the objective in compliance with 40 Code of Federal Regulations part 131.11(a)(2) (2003) was the outcome of the Cities' federal court challenge, the Water Boards are amenable to that result (although they do not join in the Cities' reasoning). The District Judge granted summary judgment in the Cities' favor, but the result was a remand back to EPA. (Exhibit "A" to Water Boards' Request for Judicial Notice, p. 10; Exhibit "B," pp. 5-6)(granted on March 15, 2002).) After reconsidering the matter, EPA issued its February 15, 2002, approval letter. At this time, the existing narrative toxicity objective is an enforceable, federal water quality standard. The Cities did not challenge EPA's action on remand.

V.
THE ADMINISTRATIVE PROCEDURES ACT DOES NOT APPLY TO TRANSLATION OF THE NARRATIVE TOXICITY OBJECTIVE

The Regional Board is required to include numerical effluent limitations implementing the narrative toxicity objective in NPDES permits by 40 Code of Federal Regulations part 122.44(d)(1)(vi) (2003). Part 122.44(d)(1)(vi) gives the Regional Board three options for developing effluent limits based on narrative water quality standards. (40 C.F.R. § 122.44(d)(1)(vi)(A) – (C) (2003).) One of the options explicitly sanctioned by EPA is to use EPA's water quality criteria on a case-by-case basis. (40 C.F.R. § 122.44(d)(1)(vi)(B) (2003).) Moreover, Government Code section 11352, subdivision (b), exempts NPDES permits from the APA. The superior court, however, ruled that the Regional Board could not implement the narrative objective with EPA's water quality criteria unless those criteria were adopted in a formal rule making under the APA. (Gov. Code, §§ 11340 et seq.; LAA XVII 5003:4-10; BAA XII

3395:25 – 3396:3.)[11]

Had the Cities prevailed on this issue in a published decision, nearly every NPDES permitting proceeding would have been converted into formal rulemaking under the APA complete with the delays needed for review by the State Board and the Office of Administrative Law. The utility of narrative objectives for regulation of water quality would have been almost completely eroded, and the Water Boards would have been precluded from using EPA's water quality criteria as specifically allowed by 40 Code of Federal Regulations part 122.44(d)(1)(vi)(B) (2003).

The Court of Appeal correctly noted that the abundant regulatory information on how the narrative toxicity objective will be used to derive numerical effluent limitations defeats the Cities' claim that implementation of that objective is subject to the APA. (Slip Op., p. 29.) In addition, the Cities have never been able to explain how an effluent limitation included in a permit binding only one facility can be a rule of general application subject to the APA. For an order to be a regulation under the APA, it must be an order of general application. (Gov. Code, § 11342.600; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) The very nature of an NPDES permit is inconsistent with the definition of a regulation, which is undoubtedly why the Legislature exempted NPDES permits from the APA by Government Code section 11352, subdivision (b).

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[11] Contrary to the Cities' assertion (Opening Brief, pp. 45-46), this ruling was separate from the ruling regarding the adequacy of the findings that the Water Boards did not appeal.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Dated: March 8, 2004

Respectfully Submitted,

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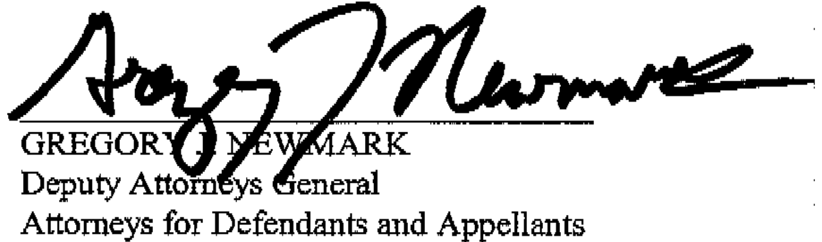

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Certification of Word Count

Pursuant to California Rules of Court, rule 29.1(c)(1), I hereby certify that the text of this brief is 13,984 words in length, as counted by the computer program used to prepare the brief, WordPerfect version 8.0.

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is 300 S. Spring Street, Los Angeles, California 90013. On March 8, 2004, I served the attached documents described as:

WATER BOARDS' ANSWER BRIEF ON THE MERITS

_X_ **BY OVERNIGHT MAIL:** I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by United Parcel Service for overnight delivery to the individual(s) listed below

SEE ATTACHED SERVICE LIST

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

Executed this 8th day of March 2004 at Los Angeles, California.

LETICIA SILVA