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DEPARTMENT
OF UTILITIES

ENGINEERING
SERVICES DIVISION

CITY OF SACRAMENTO
CALIFORNIA

1395 35th AVENUE
SACRAMENTO, CA
95822-2911

PH 916-264-1400
FAX 916-264-1497/1498

August 22, 2001

Law and Legislation Committee
Sacramento, California

Honorable Members in Session:

**SUBJECT: REQUEST AN OFFICE OF ADMINISTRATIVE LAW DETERMINATION
CONCERNING THE STATE WATER RESOURCES CONTROL BOARD
ESTABLISHMENT OF POLICY REGARDING STANDARD URBAN STORM
WATER MITIGATION PLANS (SUSMP)**

RECOMMENDATION:

Staff recommends the Law and Legislation Committee authorize the Director of the Department of Utilities to file a request for an OAL Determination challenging the SWRCB establishment of policy regarding SUSMPs.

CONTACT PERSON: Gary A. Reents, Engineering Services Manager, 264-1433
Dave Brent, Principal Engineer, 264-1420

FOR COMMITTEE MEETING OF: September 4, 2001

SUMMARY

In December 2001, the State Water Resources Control Board (State Board) upheld the Los Angeles County NPDES stormwater permit that had been appealed by municipal stormwater agencies and building interest in Los Angeles County. The focus of the appeal was a provision that established development standards for stormwater runoff (termed SUSMP) in the Los Angeles County region. Following the ruling, State Board staff published a memorandum establishing the Los Angeles SUSMP requirements as a



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statewide requirement applicable to all municipal stormwater permits. In a letter dated March 15, 2001, Sacramento and several other municipalities requested State Board staff repeal its memorandum based on grounds that the "requirement" had not been promulgated in accordance to the Administrative Procedures Act. The City Attorney's office reviewed and concurred with the merit of this request. Being rebuffed by State Board staff, this same group of municipal agencies, now joined by additional agencies, is requesting the OAL to determine the validity of State Board staff's requirement.

BACKGROUND INFORMATION

The City of Sacramento has had development standards for urban stormwater runoff since 1994. An example of these standards are the large, regional detention facilities in the North Natomas area which serve as water quality treatment facilities as well as flood control facilities. These development standards were implemented proactively as part of the City's Stormwater Management Program and, at the time, exceeded the requirements of the National Pollutant Discharge Elimination System (NPDES) permit governing the Program. These standards were carefully crafted to optimize water quality enhancement and considered such factors as local rainfall, hydrology, and landuse unique to the Sacramento area.

In the Los Angeles area, the Los Angeles Regional Water Quality Control Board rejected the development standards proposed by local stormwater agencies and subsequently imposed development standards, termed Standard Urban Stormwater Mitigation Plans (SUSMP), on the Los Angeles area agencies. The Los Angeles area municipalities and the local building interests contested the requirements and ultimately appealed the issue to the State Water Resources Control Board. While following the case with interest, other jurisdictions throughout the state were never notified that the State Board's hearing of the case would result in a "precedential decision" and the development of a statewide requirement or policy.

However, in December 2000, after the State Board upheld the SUSMP standards for the Los Angeles permit, the State Board legal counsel published a memorandum to the executive officers of all the regional boards which cited the Los Angeles SUSMP as a "precedential decision" and a rule of general application that must be included in all NPDES permits. In March 2001, an appeal letter was sent to the State Board on behalf of Sacramento and several other communities requesting the State Board to rescind the memorandum on the basis that State Board staff had promulgated defacto regulations without regard to the noticing and hearing requirements of the Administrative Procedures Act. Prior to participating to this request, the City Attorney's office reviewed the letter and

concurred with the merit of the appeal. In response, State Board staff claimed that the Los Angeles appeal and State Boards' subsequent hearing on that specific permit were sufficient to establish statewide policy.

It continues to be the opinion of the Sacramento Stormwater Management staff and our peers from several other stormwater agencies that State Board staff has circumvented the Administrative Procedures Act and overreached its authority in establishing a statewide requirement without due process.

From a technical standpoint, we strongly support the premise that development standards should be required in all NPDES stormwater permits. In fact, the Sacramento Stormwater Management Program has imposed development standards since 1994. One of the top priorities of the Stormwater Management Program continues to be the implementation of non-structural and structural water quality controls that are specific to the Sacramento area and the particular land use and pollutants of concern. The Stormwater Management Program is continually monitoring site runoff, evaluating stormwater treatment devices and modifying local standards to achieve a maximum and cost effective water quality benefit. We strongly disagree with the notion that the SUSMP applied in the Los Angeles region is the best approach for controlling urban runoff pollutants from new developments in Sacramento.

Based on the procedural and technical concerns described above, the same group of local agencies that sent the March 2001 letter to the State Board and a couple of additional agencies are proposing to request the Office of Administrative Law to make a determination on the issue. The application and supporting documentation for this request are included as an attachment to this staff report. Upon approval of the Law and Legislation Committee, the Director of the Department of Utilities will sign the application and it will be submitted together with identical applications from the following jurisdictions:

Fresno Metropolitan Flood Control District
Orange County Public Works Department
Riverside County Flood Control District
San Bernardino County Public Works
Ventura County Public Works
Santa Clara Valley Water District
City of Modesto

FINANCIAL CONSIDERATIONS: None

POLICY CONSIDERATIONS:

The State Board staffs' establishment of a statewide SUSMP policy that circumvents the provisions of California law and is not based on technical merits sets a dangerous precedent that disregards local agency land use authority and does not serve to improve water quality. In order to achieve reduction of stormwater pollutants to the maximum extent practicable and impose workable standards, local stormwater agencies need to have the ability to adopt development standards that take into consideration local climatic, hydrologic, topographic and pollutant source factors. Joining other jurisdictions in filing a request for an Office of Administrative Law Determination is a necessary action to assure due process under California law.

ENVIRONMENTAL CONSIDERATIONS:

The actions recommended in this report are exempt from the California Environmental Quality Act according to CEQA Guidelines Section 51378, in that these actions do not have the "potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

ESBD CONSIDERATIONS:

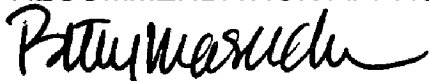
No goods or services are being purchased under this report.

Respectfully submitted:



Gary A. Reents
Engineering Services Division Manager

RECOMMENDATION APPROVED:



Betty Masuoka
Assistant City Manager

APPROVED:



Jim Sequeira
Director of Utilities

STATE OF CALIFORNIA
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, CA 95814-4602
(916) 323-6225

REQUEST FOR DETERMINATION – FORM 1013 (5/01)
(Government Code section 11340.5; Title 1, CCR, section 122)

(Instructions appear at the end of the form.)

1.

Name of Person Submitting Request		
Mailing Address		
City	State	Zip Code
Telephone Number ()	Fax Number (if any) ()	E-mail Address (if any)
Name of Association, Organization, Company or Other Person (if applicable)		

2. Name of state agency whose rule is being challenged:
STATE WATER RESOURCES CONTROL BOARD

3.

Identify specifically the state agency rule that is the subject of the request. Attach additional pages if necessary:
December 26, 2000 Memorandum from State Water Resources Control Board Office of Chief Counsel to Executive Officers of the Regional Water Quality Control Boards re: SWRCB Order No. WQ 2000-11 and Standard Urban Storm Water Mitigation Plans ("SUSMPs")

4. Attach a copy of the written state agency rule that is the subject of the request or a copy of the document created or provided by the state agency that articulates or describes the state agency rule being challenged. OAL will not accept a request for determination concerning a state agency rule that cannot be documented in this manner.
5. Attach all written information or evidence, if any, regarding the state agency rule.
6. Have you brought this matter to the attention of the head of the state agency prior to submitting your request? ☐ NO ☒ YES

If "yes," how did you do this? ☐ ORALLY (telephone call or in person)
☒ IN WRITING (letter, fax or email)

If you did this in writing, including a copy of your written communication(s) and a copy of any written response(s) from the state agency with your Form 1013.

7. Complete the following declaration:

DECLARATION	
I, _____, declare under penalty of perjury (Name of Individual Submitting the Request) under the laws of the State of California that all information contained in this Form 1013 is true and correct and that any documents submitted with this Form 1013 are to the best of my knowledge true and correct copies of the originals, and that this declaration was executed this _____ of _____, _____, at _____ (day) (month) (year) (city) _____ (state)	
Printed Name	Signature

8. Complete the following transmittal declaration:

TRANSMITTAL DECLARATION		
I, _____, declare under penalty (Name of Person Who Transmitted a Copy of the Request to the State Agency) of perjury under the laws of the State of California that a copy of Form 1013, and any attachments, were hand-delivered or transmitted by the United States mail or other mail delivery service on _____ of _____, _____, to the head of the state agency whose (day) (month) (year) rule is the subject of this Form 1013 at the following address:		
Name of Head of State Agency Celeste Cantú	Title Executive Director	
Name of State Agency State Water Resources Control Board		
Address 1001 I Street		
City Sacramento	State CA	Zip Code 95814
and that this declaration was executed this _____ of _____, _____, at _____ (day) (month) (year) _____ (city) (state)		
		Signature

Re: Written Information and Evidence in Support of Request for Determination
Regarding State Water Resources Control Board December 26, 2000
Memorandum

I. INTRODUCTION

This Request for an Office of Administrative Law ("OAL") Determination in accordance with Government Code section 11340.5 concerns the December 26, 2000 Memorandum issued by the SWRCB regarding SWRCB Order No. WQ 2000-11 and Standard Urban Storm Water Mitigation Plans. A copy of the December 26, 2000 Memorandum issued by the State Water Resources Control Board ("SWRCB") Office of Chief Counsel which constitutes the rule being challenged is attached hereto as Exhibit A. A letter was sent to the SWRCB on behalf of various agencies on March 15, 2001. The SWRCB responded to this letter in a letter dated March 22, 2001. These letters are attached hereto as Exhibit B.

The December 26, 2000 Memorandum establishes a policy, plan or guideline that has not been promulgated in accordance with the Administrative Procedures Act ("APA"). (Gov. Code, § 11340 *et seq.*) The SWRCB's failure to comply with the procedural requirements of the APA renders the December 26, 2000 Memorandum invalid and unenforceable.

II. DISCUSSION

A. Factual Description of Rule and Application to Affected Persons

On December 26, 2000, the SWRCB Office of Chief Counsel issued a memorandum to Executive Officers of the Regional Water Quality Control Boards ("Regional Boards") concerning SWRCB Order No. WQ 2000-11 and Standard Urban Storm Water Mitigation Plans ("SUSMPs") ("December 26, 2000 Memorandum" or "Memorandum"). (Order No. WQ 2000-11 is attached hereto as Exhibit C.) The Memorandum directs that the Regional Boards take specific actions when issuing municipal stormwater permits, and adopts new statewide policy with regard to stormwater permits.

The regulation in issue implements, interprets, or makes specific the duties of Regional Boards in issuing permits to comply with section 402(p)(3)(B) of the Clean Water Act (33 U.S.C. § 1251 *et seq.*) ("CWA") as well as the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 *et seq.*) ("Porter-Cologne").

1. Background

The CWA, adopted in 1972, provides a comprehensive program to protect surface waters through control, treatment and elimination of pollutant sources. The CWA provides for the adoption by the states of "water quality standards" for most surface waters of the state. (33 U.S.C. § 1313(c).) Under the CWA, a water quality

standard consists of the designated use of the water body involved and a water quality criterion to protect that use. (33 U.S.C. § 1313(c)(2)(A).) Federal law requires that water quality standards be adopted pursuant to state law. (40 C.F.R. § 131.6(e); *American Paper Institute, Inc. v. EPA* (D.C. Cir. 1993) 996 F.2d 346, 349.)

Section 301 of the CWA prohibits the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by a national pollutant discharge elimination system ("NPDES") permit. (33 U.S.C. § 1311.) The provisions for adoption of NPDES permits are contained in section 402. (33 U.S.C. § 1341.) Authority to issue NPDES permits in California has been delegated to the State. (Wat. Code, § 13370; 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1 *et seq.*)

In California, Porter-Cologne sets forth the state's policy for water quality. Porter-Cologne is also the primary means by which the state achieves compliance with the CWA. The SWRCB is designated as the state water pollution control agency for all purposes set forth in the CWA. (Wat. Code, § 13160.) Porter-Cologne is administered both by the SWRCB and the nine Regional Boards. (Wat. Code, § 13001.)

Porter-Cologne requires the Regional Boards to "formulate and adopt water quality control plans for all areas within the region." (Wat. Code, § 13240.) A Water Quality Control Plan, also called a "Basin Plan," must: (1) identify "beneficial uses" of water to be protected; (2) establish water quality "objectives"; and (3) establish a program of implementation for achieving the water quality objectives. (Wat. Code, § 13050(j).) The CWA requirement that states adopt water quality standards is fulfilled in California by the adoption of Basin Plans. The substantive and procedural requirements of Porter-Cologne apply to the adoption of Basin Plans. Water Code section 13244 requires public notice and hearing procedures for adoption of water quality standards/Basin Plans. Water Code section 13245 requires a Regional Board to submit a Basin Plan, which contains water quality standards, to the State Board for approval. (Wat. Code, § 13245.)

As stated, the State is also delegated the authority to issue NPDES permits. (Wat. Code, § 13370; 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1 *et seq.*) The nine Regional Boards, each with jurisdiction over a specific area of the state (Water Code § 13200) issue the individual NPDES permits for dischargers within the region. NPDES permits are required for all discharges of pollutants from a point source to surface waters (33 U.S.C. § 1311), including municipal stormwater discharges. (33 U.S.C. § 1342(p).) While municipal stormwater discharges are required to obtain a permit, they are unique and treated differently than other point source discharges. For example, municipal stormwater discharges, unlike other point source discharges, need not strictly comply with state water quality standards. (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The special treatment of municipal stormwater discharges stems from the unique and complex nature of stormwater. As the SWRCB has noted, "the nature and effects of storm

water discharges are complicated." (In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society, SWRCB Order No. 91-03 (May 16, 1991).) "Storm drains raise unique problems and differ from other types of point source discharges in that only limited information is currently available concerning the sources and loadings of the pollutants and the effectiveness of many of the control measures." (*Id.*) Additionally, the "frequency, duration and magnitude of storm events and the constituents, concentrations, mechanisms, persistence and effects of runoff are poorly understood." (*Id.*) The EPA has reiterated this concept. (National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 48001 (Nov. 16, 1990).

Section 402(p)(3)(B) of the federal Clean Water Act governs permit requirements for municipal stormwater discharges. (33 U.S.C. § 1342(p)(3)(B).) In particular, the Clean Water Act requires that "permits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ." (33 U.S.C. § 1342(p)(3)(B)(iii).)

Maximum extent practicable ("MEP") is intended to be a flexible, site-specific standard. (National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68722, 68732, 68754 (Dec. 8, 1999).) "The pollutant reductions that represent MEP may be different for each [municipal stormwater discharger] given the unique local hydrological and geological concerns that may exist and the differing possible pollutant control strategies." (*Id.* at 68754.) The SWRCB has stated "an effective and cost-effective storm water program requires an analysis of the specific area subject to regulation, and should not involve a simple listing of practices that all municipalities must follow." (In the Matter of the Petition of Natural Resources Defense Council, Inc., SWRCB Order No. 91-04 (May 16, 1991), citing 53 Fed. Reg. 49456.)

2. The Rule Issued by the SWRCB

In 1996, the Regional Board for the Los Angeles Region issued a revised NPDES permit to 85 cities and Los Angeles County, for stormwater discharges from municipal separate storm sewer systems in Los Angeles County. As a means to implement CWA and Porter-Cologne requirements in the permits for these agencies, the Los Angeles Regional Board decided in the permit to require the permittees to submit SUSMPs, designating best management practices ("BMPs") for specific categories of development projects. The permittees developed SUSMPs that they determined appropriate. The Los Angeles Regional Board revised the SUSMPs that permittees submitted. Among other things, the Regional Board's SUSMPs included BMPs for various categories of development, and a numeric design standard for structural or treatment control BMPs. The SWRCB upheld the Los Angeles Regional Board's revised SUSMPs, with certain modifications, in Order No. WQ 2000-11. The SWRCB determined that the

Regional Board had acted lawfully and reasonably, that it had considered the costs of the SUSMPs required for those permits, and that "Final SUSMPs reflect a reasonable interpretation of development controls that achieve reduction of pollutants in storm water discharges to the maximum extent practicable." (Order No. WQ 2000-11 at p. 28, attached hereto as Exhibit B.) This conclusion was based on a consideration of economic and climatological factors in the region, the degree of water quality impairment in the region, and factors such as the frequency of beach closures and the amount of impervious surface in Los Angeles County. (SWRCB Order No. 2000-11 at pp. 4, 16-18, 21.) In other words, the SWRCB determined that, based on the site specific characteristics of Los Angeles County, the SUSMPs reflect controls to reduce pollutants in storm water discharges to MEP.

Order No. WQ 2000-11 specifically recognizes that "maximum extent practicable" is to be determined on a site-specific, flexible basis and that the Order is not intended for general applicability. (Order No. WQ 2000-11 at p. 15, attached hereto as Exhibit B.) Despite this clear statement in the SWRCB's Order, however, the SWRCB or its staff has issued a memorandum directing general application of the permit requirements evaluated in Order No. WQ 2000-11 to all stormwater permits.

The December 26, 2000 Memorandum states that, pursuant to Government Code section 11425.60, Order No. WQ 2000-11 is a "precedential decision" concerning the use of SUSMPs in municipal stormwater permits. The Memorandum states that "the Regional Water Quality Control Board orders must be consistent with applicable portions of the State Water Board's precedential decisions." The memorandum outlines Order No. WQ 2000-11 and states that:

In light of the specificity and detail in the Order, Regional Water Boards should simply incorporate SUSMP requirements for new development and redevelopment into new municipal permits, rather than adopting a process of submittal, review and revision of proposals. In adopting SUSMPs in permits, the requirements should be substantially similar to the SUSMPs approved in the Order. If, for example, the Regional Water Board determines that a different design standard than 85 percent of the runoff is appropriate, the permit findings should explain how the alternative design standard is generally equivalent to the standards approved in the Order, and why the alternative standard is appropriate to the area. The general principles of the Order – that design standards for BMPs for new development and redevelopment are required – must be implemented.

(December 26, 2000 Memorandum at p. 2, attached hereto as Exhibit A (emphasis added).) The Memorandum therefore establishes a rule regarding the policy for adopting stormwater permits, and sets forth specific provisions that must be included in stormwater permits.

3. Application of the Rule to Affected Parties

On its face, the December 26, 2000 Memorandum prescribes regulatory practices to be applied to agencies throughout the state. The Regional Boards and their staffs have, moreover, applied the Memorandum to agencies subject to municipal stormwater permit requirements.

The cities of Sacramento, Modesto, and Stockton as well as the Counties of Sacramento and San Joaquin, have received recent tentative permits that reflect Board Order 2000-11. The Modesto and Stockton/San Joaquin tentative permits contain the following proposed finding:

"On 5 October 2000 the State Board adopted Order WQ 2000-11, a precedential decision concerning the use of Standard Urban Storm Water Mitigation Plans (SUSMPs) in municipal storm water permits for new developments and redevelopments by the private sector. The State Board recognized that the decision includes significant legal or policy determinations that are likely to recur. (Gov. Code §11425.60.) The State Board's order requires that the Regional Board's municipal separate storm sewer system permits must be consistent with applicable portions of the State Board's decision and include SUSMPs." (Finding No. 32 in Modesto and No. 17 in Stockton/San Joaquin)

Similarly the Sacramento tentative permit contains the following proposed finding:

"On 5 October 2000 the State Water Resources Control Board (State Board) adopted Order: WQ 2000-11, a precedential decision concerning the use of Standard Urban Storm Water Mitigation Plans (SUSMPs) in MS4 permits for new development and significant redevelopment projects. The SUSMPs were initially adopted by the Los Angeles Regional Water Quality Control Board to require treatment controls for new and significant redevelopment projects. The State Board recognized that the decision includes significant legal or policy determinations that are likely to recur (Gov. Code §11425.60.). Due to the precedential nature of Order: WQ 2000-11, the Regional Board's MS4 permits must be consistent with applicable portions of the State Board's decision and include SUSMPs." (Finding No. 9)

In turn the provisions of the subject tentative permits reflect the requirements of the Los Angeles SUSMPs by specifying the type of development required to implement SUSMPs, numeric sizing criteria for structural treatment BMPs, an administrative approach to program implementation, and restrictions on the use of

infiltration BMPs. (See provision no. 20 of the Modesto tentative permit, no. 8 of the Stockton tentative permit, and no. 7 of the Sacramento tentative permit).

B. Application of the Administrative Procedures Act

1. The SWRCB is Subject to the APA

The SWRCB is a state agency that is subject to the APA. (Gov. Code, § 11000.) California Code of Regulations further provides with regard to rulemaking proceedings by the SWRCB: "Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code section 11340 *et seq.*). This section is not a limitation on additional notice requirements contained elsewhere in this chapter." (23 Cal. Code Regs. tit. 23, § 649.1.) The SWRCB's own regulations recognize that SWRCB rules are subject to the APA.

The APA contains certain specific requirements with regard to water quality which are not implicated here. Government Code section 11352 exempts from the APA the issuance, denial or waiver of any water quality certification (as authorized under Water Code section 13160) or waste discharge requirements and permits (pursuant to Water Code sections 13263 and 13377) and waivers issued pursuant to Water Code section 13269.

Government Code section 11353(a) also exempts "the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with section 13000) of the Water Code." (Gov. Code, § 11353(a).) "However any policy, plan, or guideline the State Water Resources Control Board adopted after June 1, 1992, or that a court determines is subject to this part of the APA after June 1, 1992, must comply with alternative rulemaking requirements pursuant to subsection (b) of Government Code section 11353." (In re Request for Regulatory Determination Filed by the California Manufacturers Association Regarding an Alleged Underground Regulation of the California Regional Water Quality Control Board, Los Angeles Region, used in ratifying a cleanup and abatement order, 1995 OAL Determination No. 1 (Feb. 22, 1995).) Subject to the limited exemption, which is discussed in more detail below, the SWRCB is an agency required to comply with the APA rulemaking procedures.

2. The December 26, 2000 Memorandum is a Rule Subject to the APA

The APA applies to "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.)

The December 26, 2000 Memorandum is a rule of general application issued by the SWRCB to implement, interpret, or make specific the law regarding conditions for stormwater permits.

On its face, the Memorandum makes clear that it is a rule of general application. The Memorandum was issued to all Regional Board Executive Officers, with instructions to issue permit requirements substantially similar to the Los Angeles SUSMPs. (Memorandum at p. 2, attached hereto as Exhibit A.) The Memorandum states that Regional Board orders "must be consistent with applicable portions of the State Water Board's precedential decisions." It then directs Regional Boards to incorporate SUSMP requirements into permits directly, and provides that the SUSMP requirements should be substantially similar to those for Los Angeles County. (Memorandum at p. 1, attached hereto as Exhibit A.) The purpose of the Memorandum, therefore, is to make the Los Angeles SUSMPs contained in Order No. WQ 2000-11 generally applicable to all stormwater permittees.

The Memorandum also interprets the law enforced by the SWRCB and Regional Boards by specifying particular provisions (SUSMPs and design standards) that must be included in stormwater permits. (Memorandum at p. 2, attached hereto as Exhibit A.) The Memorandum states, "the Order finds that the provisions in the SUSMPs, as revised in the Order, constitute [maximum extent practicable]." (Memorandum at p. 1, attached hereto as Exhibit A.) This Memorandum, therefore, establishes a rule regarding the definition of maximum extent practicable, and instructs the Regional Boards to adopt that definition. (Memorandum at p. 2, attached hereto as Exhibit A.)

The December 26, 2000 Memorandum establishes a rule of general application to implement, interpret or make specific the law with regard to stormwater permits, and is therefore a regulation under the APA. (Gov. Code, § 11342.600.)

3. The Limited Exemption for Water Quality Policy and Plans Does Not Apply

As discussed above, the APA includes a limited exemption for certain water quality issues. Government Code section 11352 exempts water quality certification or waste discharge requirements or permits from the APA. The Memorandum is not a water quality certification or waste discharge requirement or permit. While the Memorandum interprets the law with regard to NPDES permits, it is not a permit itself and is therefore not subject to the exemption in Government Code section 11352.

The APA also exempts "the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with Section 13000) of the Water

Code." (Gov. Code, § 11353(a).) Only policies or plans adopted pursuant to Porter-Cologne are exempt from the APA. Additionally, if those policies, plans, or guidelines are adopted by the SWRCB after June 1, 1992, they are subject to alternative rulemaking procedures under the APA. (Gov. Code, § 11353(b).) The Memorandum did not adopt a water quality control plan or policy pursuant to Porter-Cologne. The procedures at Water Code sections 13140 *et seq.* and 13240 *et seq.* were not followed.¹ Because the Memorandum is not a policy or plan adopted in accordance with Porter-Cologne, it is not subject to the limited exemption in Government Code section 11353(a).

The legislature adopted the limited exemption from the APA for SWRCB plans and policies specifically because "a comprehensive procedure is [already] required for approving plans in accordance with the Porter-Cologne Water Quality Act." (Committee Report for 1991 California Assembly Bill No. 3359, 1991-92 Regular Session, Date of Hearing June 30, 1992, Staff Analysis of Assembly Bill No. 3359 (Sher) as amended May 21, 1992.) In fact, the purpose of Government Code section 11353 was to avoid the consequences of requiring that all previously adopted water quality control plans comply with the APA, which could have resulted in invalidation of elements of the plans such as beneficial use designations, water quality objectives and discharge prohibitions. (*Id.*)

The Memorandum is not a water quality control policy or plan that was adopted in accordance with Porter-Cologne. Rather, the Memorandum sets forth a rule regarding the state's implementation of the federal Clean Water Act through NPDES permits. Because the policy set forth in the Memorandum is not adopted pursuant to Porter-Cologne, it is not subject to the exemption of Government Code section 11353(a).² The Memorandum does not fall within the category of state policies and plans identified in Government Code section 11353(a) and therefore the APA applies to the Memorandum. (See 1995 OAL Determination No. 1.)

III. CONCLUSION

The December 26, 2000 Memorandum prescribes a rule of general application, which implements, interprets or makes specific the law enforced by the SWRCB and Regional Boards regarding stormwater permits. As discussed above, the Memorandum is not a waste discharge requirement or permit, or a policy or plan adopted pursuant to Porter-Cologne, and is therefore not subject to the limited exemption in Government Code sections 11352 and 11353. Therefore, the

¹ Porter-Cologne requires that the SWRCB hold a noticed public hearing prior to adopting state policy for water quality control. (Wat. Code, § 13147.) Porter-Cologne requires, for the adoption of water quality control plans, that the Regional Board hold a noticed public hearing (Wat. Code, § 13244) and obtain approval by the SWRCB (Wat. Code, § 13245). These procedures were not followed for adoption of the Memorandum. Therefore, it is not a policy or plan adopted pursuant to Porter-Cologne.

² Even if the limited exemption were applicable, the Memorandum would be subject to certain provisions of the APA, which were not followed by the SWRCB prior to issuing the memorandum.

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Memorandum is subject to the APA. Because the SWRCB failed to comply with the procedures of the APA prior to adopting the rule in the Memorandum, the Memorandum is invalid.