IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-71080

DEFENDERS OF WILDLIFE and THE SIERRA CLUB,

Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondents.

ON PETITION FOR REVIEW OF AGENCY ACTION
BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF THE AMERICAN PUBLIC WORKS ASSOCIATION, THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE FLOOD CONTROL DISTRICT OF MARICOPA COUNTY, THE LEAGUE OF ARIZONA CITIES AND TOWNS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, and THE NATIONAL LEAGUE OF CITIES AS AMICI CURIAE IN SUPPORT OF THE PERMITTEE INTERVENORS

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The undersigned amicus groups represent a large number of city and county governments and public works organizations responsible for the operation, oversight and management of municipal storm sewer systems, as well as agencies, companies and professionals involved in ensuring that such systems are designed, operated and maintained in compliance with applicable laws and regulations.

1. The American Public Works Association (APWA) is an organization of 25,000 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs.

2. The Association of Metropolitan Sewerage Agencies (AMSA) represents the interests of 213 of the nation's wastewater treatment agencies. AMSA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 17 billion gallons of wastewater each day. Numerous AMSA members are regulated by the Clean Water Act's permit program for municipal separate sewer systems.

3. The Flood Control District of Maricopa County provides regional flood and storm water management services. Maricopa County encompasses an area over 9,000 square miles and includes the Phoenix metropolitan area and unincorporated areas and more

than twenty cities which will be included in the proposed Phase II storm water permitting program.

4. The League of Arizona Cities and Towns is a voluntary association of all of the incorporated cities and towns in the State of Arizona.

5. The National Association of Counties (NACo) is the only national organization representing county government in the United States. NACo's membership totals nearly 2000 urban, suburban, and rural counties, containing over 90 percent of the nation's population.

6. The National Association of Flood and Stormwater Management Agencies (NAFSMA) is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government. NAFSMA member agencies serve a combined population of approximately fifty (50) million people.

7. The National League of Cities (NLC) is the country's largest and oldest organization serving municipal governments, comprised of 1500 member communities and 49 state municipal leagues which collectively represent more than 18,000 municipalities and more than 135,000 local elected officials throughout the United States.

The issues raised in this appeal involve the interpretation of provisions in the Clean Water Act and EPA's implementing regulations for the stormwater program. The 1987 amendments to the Act created a new standard requiring municipal stormwater permits to include controls to reduce pollutants to the maximum extent practicable, in place of the requirements that would have applied under previous law. In this appeal, the Court is being asked to interpret the meaning of this new standard and to determine whether municipal stormwater permits must also contain any more stringent effluent limitations necessary to achieve water quality standards. The Court's decision on these issues will have a direct economic and practical impact on the members of each of the undersigned groups.[1]

The interests of the amicus groups are aligned with the Intervenors in this appeal, the city and county government entities to whom the disputed permits were issued. The amicus groups believe this brief will assist this Court in examining the

[1]During the debate over the 1987 CWA amendments, it was estimated that the cost to municipalities of obtaining permits and complying with EPA's proposed permit regulations for each of the millions of stormwater discharge points across the country "could have easily exceeded $8.5 billion." 132 Cong. Rec. 31986 (1986) (remarks of Rep. Rowland); reprinted in 2 A Legislative History of the Water Quality Act of 1987 (Committee Print compiled for the Senate Committee on Environment and Public Works), 678 (1988) [hereinafter Legis. Hist.]. A more recent study, conducted by the Southern California Chapter of APWA, estimated that the cost of implementing best management practices required under the current stormwater program would exceed $1.15 billion per year, while the construction and maintenance of advanced treatment processes to meet water quality-based limits would require more than $406 billion in capital costs and $542 billion for annual operation and maintenance. J.M. Montgomery, A Study of Nationwide Costs to Implement Municipal Stormwater Best Management Practices, Table ES-1 (May, 1992).

legislative history of the Act and the full background of the federal stormwater regulations. The groups believe that the arguments presented by the Respondents do not fairly represent the intentions of Congress in enacting the 1987 amendments or the history of EPA's interpretation of the statute. The amicus brief supports the position of the Intervenors by providing additional background on the statute and the regulatory history of the stormwater program.

STANDARD OF REVIEW

The standard of review for EPA's final action in issuing the subject NPDES permits, and denying the Petitioners' request for an evidentiary hearing, is whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). On questions of statutory construction, the court must carry out the unambiguously expressed intent of Congress. Natural Resources Defense Council, Inc. v. U.S. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992). The court must not defer to an agency interpretation that alters the clearly expressed intent of Congress. American Mining Congress v. EPA, 965 F.2d 759, 764 (9th Cir. 1992).

SUMMARY OF ARGUMENT

Prior to 1987, all stormwater permits were required to meet both the technology-based standards of the Act and any more stringent limitations necessary to achieve water quality standards, without regard to practicability. The 1987 Clean Water Act amendments created a new standard for municipal

stormwater permits. While permits for industrial stormwater discharges were required to meet both the technology-based and water quality-based requirements of the Act, permits for municipal storm sewers were only required to include controls to reduce the discharge of pollutants to the "maximum extent practicable" (MEP).

The legislative history of the 1987 amendments shows that Congress intended to create a partial exemption from the Act's normal permit requirements for municipal stormwater discharges, both in terms of the deadlines for issuing permits and in the nature of the controls to be required. Petitioners assert that all municipal stormwater permits must contain numeric effluent limitations and whole effluent toxicity limitations to ensure compliance with state water quality standards. Respondents agree that municipal permits must contain requirements necessary to meet water quality standards, but that such requirements may take the form of best management practices when numeric limitations are infeasible. Both views are contrary to the plain language and legislative history of the 1987 amendments. Respondents' position is inconsistent and with EPA's own previously expressed interpretations of the statute, and is therefore not entitled to deference.

ARGUMENT

I. The 1987 Clean Water Act Amendments Established a New Standard for Municipal Stormwater Permits, Requiring Controls to Reduce the Discharge of Pollutants to the "Maximum Extent Practicable"

For a second time, this Court is asked to address the meaning of Clean Water Act ("CWA") § 402(p)(3)(B), as enacted in the Water Quality Act Amendments of 1987 (the "1987 amendments"). In Natural Resources Defense Council, Inc. v. U.S. EPA, 966 F.2d 1292 (9th Cir. 1992), this Court was presented with a challenge to EPA's implementing regulations for "Phase I" of the stormwater[2] permit program, including the Agency's decision not to require minimum criteria or performance standards for municipal stormwater discharges. In ruling against the petitioners, this Court correctly summarized the law as follows:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge. CWA § 402(p)(3)(A), (B), 33 U.S.C. § 1342(p)(3)(A)-(B).

966 F.2d at 1308. Observing that Congress "did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements," the Court upheld the challenged regulations. Id. In doing so, however, it noted that whether a specific permit complied with the requirements of § 402(p)(3)(B)

[2] "Stormwater" is spelled as one word in the Clean Water Act. EPA has chosen instead to follow the Government Printing Office's approved form where "storm water" appears as two words. 53 Fed. Reg. 49416, 49426-27 (Dec. 7, 1988); 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990).

would be another matter not controlled by its decision. Id. at 1308 n.18.

Today the Court is presented with a challenge to five individual permits issued to municipalities pursuant to the regulations it upheld in 1992. However, instead of asking the Court to address the question it left open at that time -- whether a specific permit complies with the MEP standard -- the Petitioners are actually repeating the question that has already been answered: whether the provision establishing the MEP standard really means what it says. Specifically, Petitioners assert that, as a matter of law,[3] all municipal storm sewer permits must include not only the management practices required by CWA § 402(p)(3)(B), but also "any more stringent limitations necessary to meet water quality standards" pursuant to CWA § 301(b)(1)(C). According to Petitioners, the MEP standard is to be applied "in addition to," rather than in place of, the water quality-based control requirements of CWA § 301(b)(1)(C). Brief for Petitioners at 15.

In support of the arguments presented by the Intervenors, the amici submit that the Court has already rejected this contention, and urge that it reaffirm its previous holding in

[3]Petitioners' concede that their objections were "purely legal in nature." Brief for Petitioners at 12. See also the Petitioners' Notice of Appeal and Petition for Review to the Environmental Appeals Board, which stated that "all of the issues that petitioners are raising are legal, not factual," and that the permits were "legally invalid" because, inter alia, they failed to contain numeric effluent limits to assure compliance with all numeric water quality standards and whole effluent toxicity limits to assure compliance with narrative water quality criteria. E.R. 240, 249.

this case. Because the Respondents have agreed with the Petitioners' underlying premise, that municipal stormwater permits must contain requirements as stringent as necessary to meet water quality standards, Brief of Respondents at 20, the amici are particularly anxious that the Court should not inadvertently endorse this view while upholding the disputed permits for procedural or other reasons. Collectively, the amici represent thousands of municipal governments and agencies throughout the United States, and having participated in the legislative compromise that was forged in the 1987 amendments,[4] they submit that both the Petitioners and the Respondents have taken positions in this appeal which are inconsistent with both the plain language of the of the statute and the intent of Congress. EPA's action in issuing the disputed permits should be upheld because they comply with the MEP standard set forth in CWA § 402(p)(3)(B), and nothing more is required.

A. The 1987 amendments were designed to relieve municipal stormwater discharges from the requirement to meet water quality standards without regard to practicability

1. Prior to 1987 all permits were required to include both technology-based and water quality-based controls

In order to understand the place of the MEP standard in the statutory scheme, it is necessary to review the basic types of effluent limitations established prior to 1987. Section 301 of

[4]NLC's support of the conference agreement on the 1987 amendments was noted by Rep. Hammerschmidt. 133 Cong. Rec. 984 (1987), reprinted in 1 Legis. Hist., supra, at 527.

the Clean Water Act ("CWA"), as enacted by the Federal Water Pollution Control Act Amendments of 1972, established two distinct types of controls on point source discharges to waters of the United States, requiring both "technology-based" and "water quality-based" effluent limitations. The first type of controls involves a "series of progressively more demanding technology-based standards," applicable to different categories of dischargers and subject to different statutory deadlines. Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987). Each of these standards involves some consideration of economic and technical feasibility. All conventional pollutants[5] must be controlled through application of either the "best practicable control technology currently available" (BPT) or the "best conventional pollutant control technology" (BCT). BPT is the baseline level of control, and requires consideration of the total cost of the technology in relation to the effluent reduction benefits to be achieved. See Rybachek v. U.S. EPA, 904 F.2d 1276, 1289 (9th Cir. 1990). All toxic and non-conventional pollutants must be controlled through the use of "best available technology economically achievable" (BAT). In developing BAT limitations, cost is less important than for BPT standards, and it need not be compared with the expected benefits of effluent reduction. Id. at 1291.

[5]Conventional pollutants are defined as biological oxygen demand (BOD), total suspended solids (TSS), oil & grease, pH, and fecal coliform bacteria. CWA § 304(a)(4).

Section 301(b)(1)(C) of the Act requires that discharges must also achieve "any more stringent limitation" necessary to meet water quality standards established pursuant to state law. In contrast with technology-based standards, water quality-based limitations must be achieved without regard to feasibility or cost. See Ackels v. U.S. EPA, 7 F.3d 862, 865 (9th Cir. 1993). The legislative history of the 1972 Act made it clear that § 301(b)(1)(C) requires whatever level of effluent control is needed to implement water quality standards "without regard to the limits of practicability." S. Rep. No. 92-414, reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3710. The BPT standard is not based upon ambient water quality considerations, and Congress recognized that water quality standards "may require higher levels of control than can be achieved if only the 'best practicable' is applied." Id.

The new standard for municipal stormwater discharges established in the 1987 amendments must be understood in the context of this statutory framework. Congress explicitly stated that industrial stormwater discharges would continue to be subject to all applicable requirements of § 301, including both technology-based and water quality-based effluent limitations. Municipal stormwater discharges, on the other hand, were only required to reduce the level of pollutants to the "maximum extent practicable." Congress was fully aware of the Act's prior legislative history and the significance of the term "practicable" as it had previously been used in other sections of

the statute. See United States v. Hanousek, No. 97-30185, 1999 U.S. App. LEXIS 4585, at *7 (9th Cir. Mar. 19, 1999) ("Congress is presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted"). The interpretation espoused by both the Petitioners and the Respondents (that the CWA requires the imposition of water quality-based effluent limitations in municipal stormwater permits even if they are more stringent than "practicable") would render § 402(p)(3)(B)(iii) meaningless.

2. Constant litigation over EPA's approach to the regulation of stormwater discharges led Congress to establish a new standard for municipal stormwater permits in 1987

At the time of the 1987 amendments, Congress was also aware of the shambles created by previous regulatory attempts to develop an appropriate stormwater program. Due to the extremely broad definition of the terms "pollutant" and "point source" in § 502(6) and (14), the regulation of stormwater discharges had been a difficult and contentious issue ever since the CWA was enacted in 1972. Pursuant to § 301(a), the discharge of any pollutant from any point source is unlawful except in compliance with a permit issued under § 402. Section 402(a) provides that EPA may issue permits for the discharge of any pollutant upon condition that such discharge will meet "all applicable requirements" of § 301.

Nevertheless, because of the unique nature of stormwater runoff, which varies tremendously in terms of the frequency, magnitude and duration of flows and the amount and types of

pollutants it contains, EPA has attempted to regulate such discharges differently from other point sources. EPA recognized that such discharges were ill-suited to the traditional end-of-pipe controls that are applied to industrial point sources and publicly-owned treatment works. Due to the intermittent, variable and unpredictable nature of municipal stormwater flows, the Agency believed that the problems caused by such discharges were better managed through local controls such as the imposition of specific management practices to prevent pollutants from entering the runoff. See 55 Fed. Reg. 49416, 49419 (Dec. 7, 1988).

EPA's first stormwater regulations, promulgated in 1973, took the approach of exempting any stormwater runoff that was not contaminated by industrial or commercial activity. 38 Fed. Reg. 13530 (May 22, 1973). Those rules were challenged by the NRDC, and the D.C. Circuit agreed that EPA did not have the authority to exempt any point source discharges from regulation under the NPDES program. NRDC v. Train, 396 F.Supp. 1393 (D.D.C. 1975), aff'd sub nom. NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

In response to this decision, EPA published new stormwater regulations in 1976 that substantially increased the number of stormwater discharges subject to NPDES permit requirements. 41 Fed. Reg. 11307 (March 18, 1976). After these rules had been revised in 1979, and again in 1980, they were challenged in several courts by a number of major trade associations, several of their member companies, the NRDC and Citizens for a Better

Environment. Eventually all petitions for review were consolidated in the D.C. Circuit Court of Appeals. NRDC v. EPA, 673 F.2d 392 (D.C. Cir. 1980).

After two years of negotiations, EPA entered into a settlement that required it to promulgate an entirely new regulation intended to strike a balance between environmental concerns and the practical limitations of issuing individual permits for millions of stormwater point sources. 47 Fed. Reg. 52073 (Nov. 18, 1982). The main focus of the proposal was to limit the definition of stormwater "point source" and to reduce the application requirements for stormwater permits. EPA also issued a letter stating that, while the proposal was pending, it would not take enforcement action against stormwater dischargers other than those (1) covered by an existing NPDES permit; (2) subject to effluent limitations guidelines or toxic pollutant standards; or (3) designated as a significant contributor of pollutants.

The final rule published in 1984 distinguished between two types of storm water discharges. Those sources located at an industrial plant would be subject to normal permitting requirements, while other sources would be subject to simplified application requirements. 49 Fed. Reg. 37998 (Sept. 26, 1984). These rules generated a large number of post-promulgation comments, and once again lawsuits were filed. Revisions were proposed in 1985. 50 Fed. Reg. 9362 (Mar. 7, 1985). After 132 comments were received, EPA reopened the comment period, and

suggested the use of group applications as an alternative to the usual individual NPDES permit applications. 50 Fed. Reg. 32548 (Aug. 12, 1985).

Against this backdrop of regulatory confusion and continuous litigation over the legal requirements for stormwater discharge permits, Congress began to consider changes to the law. Ultimately, these deliberations culminated in the 1987 amendments, which provided relief from applicable permit deadlines and created an entirely new standard of controls for municipal stormwater discharges. In "Phase I" of the program, permits for large and medium municipal separate storm sewer systems (dubbed "MS4s" in subsequent EPA regulations) were to be issued four years and six years, respectively, after the statute was passed. "Phase II" of the program relates to stormwater discharges from smaller municipalities. In the short term, permits for these discharges would meet the same requirement as Phase I discharges. Over the longer term, EPA was to conduct studies to establish procedures and methods to control stormwater discharges to mitigate impacts on water quality. Ultimately, EPA was to issue regulations establishing a "comprehensive program" to regulate the Phase II sources, including performance standards, guidelines, management practices and treatment requirements as appropriate. Those rules have not yet been issued in final form.

Legislative efforts leading to the Water Quality Act of 1987, P.L. 100-4, actually began with hearings in the Second

Session of the 97th Congress in 1982. Further activity occurred in the 98th Congress (1983-84), and bills introduced at that time were the basis for the final legislation enacted in the 99th and 100th Congresses. During the First Session of the 99th Congress, the Senate and House each passed bills (S. 1128 and H.R. 8) which were then referred to conference. Although each of these bills contained provisions dealing with stormwater, the exemption for municipal storm sewers was added during the conference committee sessions and embodied in the final bill, S. 1128, reported by the conferees in October 1986. The first discussion of the new permit requirements for municipal stormwater discharges therefore appears in the Conference Report on S. 1128, H. Rep. No. 99-1004, 99th Cong. 2d Sess. (1986), and in the subsequent floor debate that occurred during October of 1986.

The final bill was passed unanimously by both houses, but vetoed on Nov. 6, 1986 after Congress had adjourned. The 100th Congress moved quickly to pass identical legislation in January 1987 (H.R. 1). This bill was vetoed again on Jan. 30, 1987, but the veto was overridden and the bill was enacted as P.L. 100-4. Additional debate relating to the final bill occurred in both houses during January and February of 1987.

B. The legislative history of the 1987 amendments shows that Congress intended to create a new program of controls for municipal stormwater discharges, based on management practices rather than numeric water quality-based effluent limitations

Both the Petitioners and the Respondents suggest that in order to read § 402(p)(3) as relieving municipal stormwater

discharges from the general requirement to achieve water quality standards, one would have to find an "implied repeal" of § 301(b)(1)(C) or an "implicit waiver" of other requirements of the Act. Brief for Petitioners at 15-16; Brief of Respondents at 22-23. This is not true. Section 301(b)(1)(C) continues to apply to permits for other point sources, including industrial stormwater discharges; § 402(p)(3) merely creates an exemption for MS4s. There is nothing extraordinary about this. Like any statute, the CWA is filled with specific provisions that provide exceptions to its general requirements. Section 402 contains a number of specific exemptions from the general requirements of the Act. For example, paragraphs (1) and (2) of § 402(l) exempt "agricultural return flows" and certain "stormwater runoff from oil, gas and mining operations" from the Act's permitting requirement altogether. Neither the Petitioners nor the Respondents question the fact that § 402(p)(1) creates an exception from the otherwise applicable deadlines in § 301 for all discharges composed entirely of stormwater, or that § 402(p)(2) creates an exception to the exception for five specific categories of such discharges. As the Intervenors have argued, § 402(p)(3)(B) was intended to establish a new standard for municipal stormwater permits, as an exception to the requirements applied to other point sources pursuant to § 301(b). Joint Brief of Intervenors at 27-32.

The legislative history relating to § 402(p) is not extensive, but it is clear. The provision reflects a

legislative compromise, forged in the conference committee, that created a partial exemption for MS4s. This exemption provided relief from the general requirements of the Act relating to the deadlines for issuing permits and the nature of the controls to be imposed.

As referred to the conference committee, both the Senate and House bills contained exemptions for certain categories of stormwater discharges, but municipal storm sewers were explicitly excluded from the exemptions. The Senate bill exempted discharges composed entirely of stormwater other than (A) those associated with industrial activity or a municipal separate storm sewer, or (B) those determined to violate water quality standards or to be a significant contributor of pollutants. See 131 Cong. Rec. 15656-57 (1985) (remarks of Sen. Mattingly on Amendment No. 345 to S. 1128), reprinted in 2 Legis. Hist., supra, at 1386. The House bill exempted discharges composed entirely of stormwater runoff unless a class or category of discharges was determined to be a significant contributor of pollutants or an individual discharge was determined to violate water quality standards, but the exemption did not apply to agricultural stormwater discharges or to discharges from municipal separate storm sewers. See 131 Cong. Rec. 19996 (1985), reprinted in 2 Legis. Hist., supra, at 894; see also id. at 20004 (remarks of Rep. Roe on the amendment) ("All discharges from municipal separate storm sewers must be regulated through the permit program."), reprinted in 2 Legis. Hist., supra, at 906.

The conference committee debated the tremendous financial and regulatory burden that would be created by subjecting all municipal storm sewers to the NPDES permit program, and proposed a new solution. As Rep. Stangeland explained,

> another significant issue addressed in the conference report relates to exemptions in the House and Senate bills for stormwater discharges. Under current judicial and administrative interpretations of the law, businesses and municipalities that channel ordinary stormwater and discharge it into a navigable water would be required to obtain an NPDES permit for those discharges.
>
> The House and Senate crafted differing exemptions from this requirement to allow EPA and the States to focus their attention on the most serious problems. The conference substitute adopts a new approach, incorporating and building upon the elements of both bills. With respect to municipal separate storm sewers, the bill provides that large systems--those serving populations of over 100,000--would be subject to a permit requirement, phased in over the next few years. The conference report streamlines and phases in the permit requirements in a way that ensures that the largest systems are dealt with first and at a realistic pace. The compromise reflected in the conference-adopted language represents a balanced and targeted approach to dealing with municipal stormwater discharge problems, while at the same time establishing mechanisms that will be useful for purposes of addressing less serious stormwater discharge pollution situations after the highest priority environmental problems are solved. The provision is meant to provide relief where it is appropriate, to cities without serious stormwater pollution problems, while providing EPA and the States with the time and knowledge they need to properly address this major national water quality need.
>
> The conference report does not provide a specific permit exemption for stormwater discharges associated with industrial activity.

132 Cong. Rec. 31959 (1986) (remarks of Rep. Stangeland), reprinted in 2 Legis. Hist., supra, at 665. These sentiments were echoed by Rep. Snyder:

> [T]he conferees have extensively revised the stormwater permit provisions for municipalities, recognizing the disastrous consequences that could result if provisions in the House and Senate-passed bills remained unchanged.

132 Cong. Rec. 31964 (1986) (remarks of Rep. Snyder), reprinted in 2 Legis. Hist., supra, at 672.

In support of their argument that the CWA requires controls on MS4s that will ensure compliance with water quality standards, Petitioners quote one-half of one sentence from the Conference Report on the 1987 amendments to the Act, to the effect that MS4s "are subject to the requirements of sections 3101 and 402." Brief for Petitioners at 15. This fragmentary quotation, taken out of context, supposedly indicates that MS4s are subject to the water-quality based requirements in CWA § 301(b)(1)(C). To the contrary, when read in context, the passage actually shows that, after a certain date, MS4s are subject only to the requirement to obtain a permit, while the controls to be imposed in such permits are different from those required for other types of discharges:

> The conference substitute follows the Senate provision with respect to stormwater associated with industrial activities. The permit requirements of the Clean Water Act respecting such stormwater discharges are not subject to this amendment.
>
> With respect to municipal separate stormwater discharges, the conference substitute temporarily prohibits the Environmental Protection Agency and States from requiring permits for certain municipal separate storm sewers for discharges composed entirely of stormwater, in order to provide a sufficient period of time to develop and implement methods for managing and controlling discharges from municipal storm sewers. The relief afforded by this provision extends only to October 1, 1992. After that date, all municipal separate storm sewers are subject to the requirements of sections 301 and 402.
>
> . . . . .

> After October 1, 1992, the permit requirements of the Clean Water Act are restored for municipal storm sewer systems . . . .
>
> Permits for discharges from municipal separate stormwater systems may be issued on a system or jurisdiction-wide basis. They must include a requirement to effectively prohibit non-stormwater discharges into storm sewers and controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and other provisions determined appropriate by the EPA or a State. These controls may be different in different permits. All the types of controls listed in subsection (o)(2)(C) are not required to be incorporated into each permit.

H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. at 157-58 (1986), reprinted in 2 Legis. Hist., supra, at 846-47 (emphasis added).

In the debate on the original version of the bill, on October 16, 1986, Sen. Stafford explained the conference committee's rationale for creating a phased approach for the imposition of controls on municipal discharges:

> Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. These permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:
>
> > These are not permits in the normal sense we expect them to be. These are actual programs. These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. 32381 (1986) (remarks of Sen. Stafford), reprinted in 2 Legis. Hist., supra, at 617-18 (emphasis added).

Other passages in the legislative history demonstrate the intention of Congress to create a new and separate control

standard for municipal stormwater discharges. For example, during the Senate debate prior to re-enactment of the bill on January 14, 1987, Sen. Durenberger provided an extensive explanation of the stormwater provisions in the bill and the special treatment afforded to municipal sources:

> The Federal Water Pollution Control Act of 1972 required all point sources, including storm water dischargers, to apply for NPDES permits within 180 days of enactment. Despite this clear directive, EPA has failed to require most storm water point sources to apply for permits which would control the pollutants in their discharge.
>
> The conference bill therefore includes provisions which address industrial, municipal, and other storm water point sources. I participated in the development of this provision because I believe that it is critical for the Environmental Protection Agency to begin addressing this serious environmental problem.
>
> The bill establishes priorities, deadlines, and permit requirements for storm water point sources. It affords municipal and nonindustrial dischargers some relief from the 1972 permit application requirements.
>
> . . . . .
>
> A permit for a municipal separate storm sewer . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the storm water discharge.

133 Cong. Rec. 1279-80 (1987) (remarks of Sen. Durenberger) (emphasis added), reprinted in 1 Legis. Hist., supra, at 391. During the House debate on January 8, 1987, Rep. Roe explained that:

> Another important provision concerns management and control of municipal and industrial storm water discharges. The bill establishes a mechanism to address the major problems associated with discharges from storm sewers through a permitting procedure and the development and implementation of management

> practices, control technologies, and design and engineering methods.

133 Cong. Rec. 1006 (1987) (remarks of Rep. Roe), reprinted in 1 Legis. Hist., supra, at 559.

The effect of 402(p) is thus not an "implied repeal" of § 301 or "waiver" as the Petitioners suggest it would have to be; it is merely a particular exception or exemption from the general rule applicable to other point sources, expressed in terms of a separate and distinct standard for MS4s. Rep. Rowland, who served on the Water Resources subcommittee, noted that:

> The conference agreement, which includes a provision exempting certain storm water runoff from the NPDES permitting process takes a giant step toward reducing the immense regulatory burden being proposed by the EPA. As a result, the cost to local governments for complying with the act will be restrained.

132 Cong. Rec. 31968 (1986) (remarks of Rep. Rowland), reprinted in 2 Legis. Hist., supra, at 678; see also 132 Cong. Rec. 31959 (1986) (remarks of Rep. Stangeland) (referring to the different "exemptions" in the House and Senate bills and the approach adopted by the conference committee), reprinted in 2 Legis. Hist., supra, at 665.

The cases cited by EPA and the Petitioners, to the effect that "implied repeals" of statutory provisions are generally disfavored, are inapposite. Brief of Respondents at 22-23; Brief for Petitioners at 15-16. The interpretation urged by the Intervenors in their brief and by the amici herein does not involve any "repeal" of the statute's general requirements. Instead, § 402(p)(3)(B) merely creates a new and separate

standard for one particular category of discharges. The position of the Intervenors, that the control requirements for municipal stormwater permits are determined solely pursuant to § 402(p)(3)(B), is entirely consistent with the basic principle of statutory construction that specific provisions take precedence over general requirements of the statute. Union Central Life Insurance Co. v. Wernick, 777 F.2d 499, 501 (9th Cir. 1985).

II. EPA'S INTERPRETATION OF THE LAW IS NOT ENTITLED TO DEFERENCE WHEN IT CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTE AND IS INCONSISTENT WITH THE AGENCY'S OWN PREVIOUS POSITIONS

As this Court observed in NRDC v. EPA, "on questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress." 966 F.2d at 1297. Questions of Congressional intent that can be answered with the traditional tools of statutory construction are firmly within the province of the court. Id. It is only when the statute is silent or ambiguous on a specific issue, or when Congress leaves an explicit gap for the Agency to fill, that the court will consider whether the Agency's interpretation is based on a permissible construction of the statute. Even then, the courts must defer to an agency's statutory interpretation only so long as it is reasonable. Id.

One factor in determining whether an agency's interpretation of a statute is entitled to deference is whether it is inconsistent with previous agency positions. Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30

(1987); accord Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997); Service Employees Int'l Union, Local 102 v. San Diego, 60 F.3d 1346, 1359 (9th Cir. 1994). Radically inconsistent interpretations of a statute do not command the usual measure of deference. Pfaff v. U.S. Dept. of Housing and Urban Development, 88 F.3d 739, 748 (9th Cir. 1996). "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretations is entitled to considerably less deference than a consistently held agency view." Beno v. Shalala, 30 F.3d 1057, 1071 (9th Cir. 1994) (quoting Cardoza-Fonseca, 480 U.S. at 446 n.30).

Petitioners claim that EPA's position "since at least 1988" has been that the mandate to meet water quality standards applies to all stormwater permits. Nothing could be further from the truth. EPA's interpretation of the statute in 1988 was that municipal stormwater permits were not subject to the type of water quality-based effluent limitations that were required for industrial stormwater discharges. Furthermore, the Agency's position on this issue has changed continuously since that time, and its current interpretation is therefore not entitled to deference.

EPA has articulated its position on the meaning of CWA § 402(p)(3) on numerous occasions since 1987, including (1) the 1988 preamble to the proposed Phase I regulations; (2) the 1990 preamble to the final rule; (3) a 1991 memorandum from the Office of General Counsel; (3) a 1992 Federal Register notice requesting

comment on alternative approaches for the Phase II program; (4) the 1995 preamble to amendments of the existing stormwater regulations; and (5) a 1996 Federal Register notice describing an "interim" permitting approach for stormwater permits. Petitioners focus on the third of these documents, an internal memorandum which suggests that MS4 permits must contain whatever limitations are necessary to achieve water quality standards, even if they are more stringent than "practicable." Respondents emphasize the last, an informal policy statement which suggests that water quality-based conditions or limitations may be included in MS4 permits when the Agency decides they are necessary and appropriate. However, neither one of these documents can be singled out as the embodiment of any long-standing agency interpretation that would be entitled to judicial deference.

The 1988 and 1990 Preambles

In the 1988 preamble to the proposed Phase I regulations, EPA took a position that closely followed the language of the statute and the legislative history discussed above. In its 1990 preamble to the final regulations, the Agency deleted most of its references to the legislative history and modified its discussion of the statute to suggest that MS4 permits should not only establish controls based on the MEP standard, but also "where necessary, contain applicable water quality-based controls." 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990). Thus, where the 1988 preamble states that MS4 permits "must require controls to reduce

the discharge of pollutants to the maximum extent practicable (MEP)," 53 Fed. Reg. at 49426, the 1990 preamble states that MS4 permits "must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls," 55 Fed. Reg. at 47994 (emphasis added).

The extent of this change in position can be seen most dramatically by comparing parallel sections of the 1988 and 1990 preambles, particularly those dealing with "Responsibility for Storm Water Discharges Associated with Industrial Activity Through Municipal Separate Storm Sewers" (VI.C in 1988 and VII.C in 1990) (which considers the difference between industrial and municipal permit requirements), and "Site-Specific Storm Water Quality Management Programs for Municipal Systems" (VI.G.3 in 1988 and VII.F.3 in 1990) (which discusses the management practices required for municipalities under the MEP standard). In the 1988 preamble, the first of these sections contained a clear explanation of the different standards applicable to industrial and municipal stormwater discharges under the 1987 amendments:

> Section 402(p)(3) of the CWA establishes different standards for permits for storm water discharges associated with industrial activity and discharges from municipal separate storm sewers. Where individual permits are required for storm water discharges associated with industrial activity, these permits are required to meet all the applicable provisions of sections 402 and 301 of the Clean Water Act, including technology-based and, where necessary, water-quality based requirements. Permits for discharges from municipal separate storm sewers are required to adopt controls to reduce the discharge of pollutants to the

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

53 Fed. Reg. at 49428-29 (emphasis added). In the 1990 preamble to the final rule, this discussion was deleted without further comment or explanation 55 Fed. Reg. at 48001.

Similarly, in 1988 the Agency stated that:

> Today's notice proposes fundamental changes to EPA's approach to control the discharge of pollutants from municipal separate storm sewers. Prior to the enactment of the WQA, NPDES permits for such discharges were required to meet all applicable provisions of section 402 and section 301 of the CWA. The WQA amended this requirement by adding section 402(p)(3)(B)(iii) to the CWA which mandates that permits for discharges from municipal separate storm sewers shall require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.
>
> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. As Senator Stafford explained, municipal storm sewer system "permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:
>
> > These are not permits in the normal sense we expect them to be. These are actual programs. These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits." (Vol. 132 Cong. Rec. S16425 (daily ed. Oct. 16, 1986))

53 Fed. Reg. at 49443 (emphasis added). In the preamble to the final rule, the underlined language in the first two and the last three sentences of this passage vanished, along with EPA's proposal to make "fundamental changes" in its approach to the type of controls required for municipal stormwater discharges. 55 Fed. Reg. at 48037-38.

Despite the significant change in position reflected in the preamble, the text of the final regulation itself did not require, or even discuss, the use of water quality-based permit limitations in municipal stormwater permits. The pertinent section of the final rule, codified at 40 C.F.R. § 122.26(d)(2)(iv), is identical to the proposed rule. It contains no mention of water quality-based controls, and merely requires the permit application to contain a proposed management program "to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate." This proposed management program is to be "considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable." Thus, as this Court recognized in NRDC v. EPA, the final rule did not require any minimum criteria or performance standards for municipal stormwater discharges. 966 F.2d at 1308.

Statements in the 1990 preamble, after the period for public comment had closed, cannot be taken as a definitive

interpretation of the law, when they directly contradict the position expressed by the Agency in its 1988 preamble and are not reflected in the language of the rule itself. See Wyoming Outdoor Council, Inc. v. U.S. Forest Service, 165 F.3d 43, 53 (D.C. Cir. 1999) ("language in the preamble of a regulation is not controlling over the language of the regulation itself"). Moreover, in the 1990 preamble the Agency denied numerous requests that the rule be re-proposed for additional public comment, stating that its 1988 notice "was extremely detailed and thoroughly identified major issues in such a manner as to allow the public clear opportunities for comment." 55 Fed. Reg. at 47994. Finally, the Agency did not explain the basis for its change in view, or even acknowledge that it had taken place. In one footnote, the Agency dismissed certain comments relating to the difference between the control requirements for industrial discharges and those for municipalities as "primarily a theoretical issue." 55 Fed. Reg. at 48000, n.3.

The 1991 General Counsel Memorandum

Both EPA and the Petitioners would read § 402(p) of the statute as if it contained additional language that is not there and was not intended by Congress. Where the statute states that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable," EPA and the Petitioners would insert the words "and ensure the protection of water quality standards."

The means by which this interpretive sleight of hand is accomplished was first revealed in an internal memorandum from EPA's office of General Counsel four years after the statute was enacted. Memorandum from E. Donald Elliott to Nancy J. Marvel (Jan. 9, 1991), E.R. 6-11. The memorandum begins by asserting that the statute is "ambiguous," and that the legislative history "provides no guidance" as to its meaning. Id. at 3, E.R. 8. This allows the Agency to propose "any reasonable interpretation" consistent with the "goals and purposes" of the statute. Id. Since the "general focus" of the 1987 amendments was to "improve" water quality, the memorandum suggests that the "better reading" of the statute is that all permits for MS4s must include water-quality based requirements, "even if those requirements are more stringent than 'practicable'." Id. Without the slightest evidence in the text or legislative history of the act, the memorandum suggests that Congress may have intended the MEP standard to replace the technology-based requirements in § 301(b)(2)(A), but not the water quality-based requirements in § 301(b)(1)(C). Id. In the end, the plain language of the statute is transformed. The MEP standard has disappeared, to be replaced with "any more stringent limitations" necessary to meet water quality standards.

The 1991 memorandum was an internal agency document, addressed from the Office of General Counsel to the Regional Administrator for Region IX. Its reasoning is questionable and its interpretation is contradicted by the plain language of the

statute and by positions taken by the Agency in its publicly-noticed statements both before and after it was written. At best, the document represents a post-hoc rationalization of the new interpretation adopted by the Agency in the 1990 preamble to the final Phase I regulations, long after the public comment period had closed. It is therefore not entitled to the type of deference that the Petitioners claim it should be given.

The 1992 Federal Register Notice

In 1992, shortly after this Court had issued its opinion in NRDC v. EPA, EPA issued a "Request for Comment on Alternative Approaches for Phase II Storm Water Program." 57 Fed. Reg. 41344 (Sept. 9, 1992). Consistent with this Court's decision, EPA returned to its earlier interpretation of the statutory distinction between industrial and municipal stormwater permit requirements:

> Section 402(p)(3) confirms that, like all other point source discharges under the CWA, discharges of storm water associated with industrial activity must meet all applicable provisions of CWA sections 402 and 301, including technology-based requirements and any necessary water quality-based requirements. Permits for discharges from municipal separate storm sewer systems may be issued on a system- or jurisdiction-wide basis and must meet a new statutory standard requiring controls to reduce pollutant discharges to the maximum extent practicable (MEP).

57 Fed. Reg. at 41345 (emphasis added).

The view expressed in EPA's 1992 Request for Comment was not only consistent with the Court's decision in the NRDC case, but also with the position that the Agency itself had taken in that case. In its brief to this Court, the Agency stated that:

> In addition to establishing . . . deadlines, the WQA addressed the substantive NPDES permit requirements for storm water discharges. The WQA clarified that permits for discharges associated with industrial activity must meet all of the applicable provisions of section 402 and 301 of the CWA, i.e., all relevant effluent limitations and water quality standards. However, the 1987 amendments made significant changes to the permit standards for discharges from municipal storm sewers.

Brief of Respondents United States Environmental Protection Agency and William K. Reilly, Administrator (June 21, 1991), Case Nos. 90-70671, 91-70176, 91-70200.[6]

The 1995 Rule Amendments

On April 7, 1995, EPA published a "direct final" rule in partial fulfillment of the statutory mandate in CWA § 402(p)(6) to promulgate regulations governing "Phase II" storm water discharges.[7] As an interim measure, while a comprehensive program for the regulation of such discharges is being developed, the Agency amended its existing stormwater regulations by adding 40 C.F.R. § 122.26(g) to set forth the deadlines and application requirements for Phase II discharges. With regard to the applicable control requirements, the preamble to the rule states that:

> In developing phase II permits, the permitting authority may apply the requirements contained in [CWA] section 402(p)(3), which are the requirements for phase

[6]The Respondents' brief in the present appeal actually endorses this view, by acknowledging that in 1987 "Congress specified a new standard" for municipal stormwater permits, the "new 'maximum extent practicable' standard." Brief of Respondents at 27-28.

[7]This rule was later withdrawn and replaced by an identical rule that had been proposed the same day. The preamble to the final rule refers the reader back to the April 7, 1995 notice. 60 Fed. Reg. 40230 (August 7, 1995).

> I permits, on a case-by-case basis at this time using best professional judgment.

60 Fed. Reg. 17950, 17954 (April 7, 1995). The Agency noted that the initial portion of the Phase II program established in the rule "does not contain a comprehensive set of performance standards, guidelines, guidance, management practices, and treatment requirements" as provided in CWA § 402(p)(6). Id. The Agency acknowledged that, before it could develop a more comprehensive program for the control of municipal stormwater discharges, changes in the statute would be required. Specifically, it explained that "certain issues with regard to compliance with water quality standards can only be resolved by legislative action," such as that proposed in "President Clinton's Clean Water Initiative" in 1994. Id. at 17950. The 1994 Initiative had recommended a "phased approach for compliance of discharges from municipal separate storm sewer systems with water quality standards." Id. at 17952.

The position taken by EPA in its 1995 rule amendments thus implicitly recognized that CWA § 402(p)(3)(B) had limited the scope of existing control requirements for municipal stormwater discharges, and that further action by Congress would be needed before such discharges could be required to comply with water quality standards.

The 1996 Interim Permitting Approach

In 1996, EPA did another about-face, in an informal policy statement, published in the Federal Register but not subject to formal notice and comment procedures. "Interim Permitting

Approach for Water Quality-Based Effluent Limitations in Storm Water Permits," 61 Fed. Reg. 43761 (Aug. 26, 1996). Respondents suggest that this latest incarnation of the Agency's position on municipal stormwater permit requirements should be taken as the embodiment of some longstanding interpretation by EPA. Brief of Respondents at 29; E.R. 152. The Environmental Appeals Board (EAB) also relied heavily on the interim approach in its Order Denying Review. Order at 15-18. The Interim Approach states that best management practices will be used in the first round of municipal permits, and expanded or better tailored BMPs in subsequent permits, where necessary "to provide for the attainment of water quality standards." Moreover, the document states that "[i]n cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate."

The amici agree with Petitioners that the Interim Approach is contrary to the Act, but because it goes too far rather than not far enough. Compare Brief for Petitioners at 18-19. The amici do not question the Agency's discretion to use best management practices (BMPs) in lieu of numeric limitations where such limitations might be applied but their development is infeasible. Rather, the amici contend that numeric water quality-based effluent limitations are not applicable to MS4s to begin with.

The Interim Approach was published in the Federal Register on August 26, 1996, 61 Fed. Reg. 43761, and republished on November 6, 1996 in conjunction with a series of additional "Questions & Answers" on the issues covered in the policy. 61 Fed. Reg. 57425. Both documents were developed in the context of ongoing negotiations with a Federal Advisory Committee Act (FACA) advisory committee that had been convened by U.S. EPA in 1995 to address urban wet weather issues, including the development of a Phase II stormwater program. See 60 Fed. Reg. 21189 (May 1, 1995). The document published in the Federal Register in August and November differs markedly from the version that was circulated to the FACA committee members for review on March 12, 1996. Of course, preliminary drafts do not represent official agency positions, but in this case the evolution of the document vividly illustrates the degree to which EPA's own views on the applicability of water quality standards continues to change with alarming speed and regularity.

For example, "Question 10" in the final Q&A document asks whether the interim approach will apply to both industrial and municipal stormwater discharges. The Answer is:

> Yes. The interim permitting approach is applicable to both discharges from municipal separate storm sewer systems and storm water discharges associated with industrial activity.

61 Fed. Reg. at 57428. In the March 12 draft the Answer was completely different:

> No. The permitting context for industrial storm water permits differs from that of MS4s. In section 402(p)(3) of the CWA, Congress specifically directed that MS4

> permits would be dealt with differently. In particular, Congress specified a new technology-based level of control for MS4s, MEP, rather than best available technology (BAT), which is the technology based standard for industrial permits. In addition, MS4 permits can be issued on a system-wide basis or jurisdiction-wide basis. This is a unique distinction from industrial permits which generally need to be permitted on an outfall-by-outfall basis. By allowing MS4 permits to be issued on a jurisdiction or system-wide basis, which may include thousands of storm sewer outfalls discharging into numerous receiving waters, Congress established a distinct and different standard for municipalities. It is highly doubtful that Congress intended to apply numeric water quality-based effluent limitations for all MS4 storm sewer outfalls if an MS4 permit does not even need to specifically identify, nor be specifically applicable to, each and every outfall. The system-wide permit approach is different from the normal procedure for deriving numeric water quality-based effluent limitations, which requires that such limitations be derived specifically for each outfall relative to the specific receiving water.

"Draft Interim Policy Statement on Storm Water Circulated for Comment," Daily Env. Rep. (BNA) March 15, 1996.

Although it does not represent the final position expressed in the Agency's in the published policy statement, the discussion quoted above is worth noting for the separate and independent reason that it happens to be true. Congress <u>did</u> intend that MS4s should be treated differently than industrial point sources, that permits could be issued on a system or jurisdiction-wide basis, and that water quality based effluent limits should not be required.

Given the range of views expressed by EPA on different occasions over the last decade, it is difficult to identify any one interpretation as representing the Agency's "position" on the meaning of CWA § 402(p)(3). It would certainly be inappropriate

to afford special deference to any one document from the group discussed above, whether it is the General Counsel memorandum cited by the Petitioners, or the "Interim Approach" emphasized by the Respondents and the EAB.

CONCLUSION

The Agency's action in issuing the permits at issue in this appeal should be upheld because the permits require the implementation of management practices that comply with the MEP standard established in CWA § 402(p)(3)(B). The arguments presented by both the Petitioners and the Respondents that municipal stormwater permits must contain any more stringent requirements necessary to achieve water quality standards should be rejected. Any form of control requirements that are more stringent than "practicable" are neither required nor authorized by the statute, whether they take the form of numeric limits or otherwise. The Petitioners' arguments to the contrary cannot be sustained, and the Agency's denial of Petitioners' request for an evidentiary hearing should therefore be affirmed.

Respectfully submitted this __ day of March, 1999.

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STATEMENT OF RELATED CASES

Amici Curiae are not aware of any known related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and
Circuit Rule 32-1

I certify that the attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

____ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more tan 30 pages or a reply brief of no more than 15 pages;

_X_ This brief complies with a page or size-volume limitation established by separate court order dated December 18, 1998 and is

____ Proportionately spaced, has a typeface of 14 points or more and contains 10,335 words, or is

_X_ Monospaced, has 10.5 or fewer characters per inch and contains __ pages or _9117_ words or ____ lines of text.

Date:_____

_____
DAVID W. BURCHMORE

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of The American Public Works Association, The Association of Metropolitan Sewerage Agencies, The Flood Control District of Maricopa County, The League of Arizona Cities and Towns, The National Association of Counties, The National Association of Flood and Stormwater Management Agencies, and The National League of Cities were served by first class mail, postage prepaid, this __ day of March, 1999, on each of the following:

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