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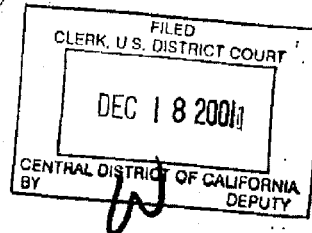
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THIS CONSTITUTES NOTICE OF ENTRY UNITED STATES DISTRICT COURT  
 AS REQUIRED BY FRCP, RULE 77(d) CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

DOWNEY, BRAND, SEYMOUR &amp; ROHWER LLP

10  
 11 CITY OF LOS ANGELES, CITY OF  
 12 BURBANK, CITY OF SIMI VALLEY, and  
 13 COUNTY SANITATION DISTRICTS OF  
 14 LOS ANGELES COUNTY, by and through its  
 agent COUNTY SANITATION DISTRICT  
 NUMBER 2 OF LOS ANGELES COUNTY,

Plaintiffs,

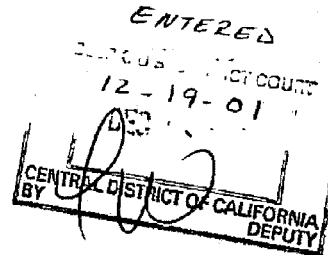
v.

16 UNITED STATES ENVIRONMENTAL  
 17 PROTECTION AGENCY, and ALEXIS  
 18 STRAUSS, Director, Water Division,  
 19 UNITED STATES ENVIRONMENTAL  
 PROTECTION AGENCY, REGION IX,

Defendants.

No. CV 00-08919 R(RZx)

**PROPOSED ORDER GRANTING  
 PLAINTIFFS' MOTION FOR  
 SUMMARY JUDGMENT AND  
 REMANDING ACTION TO EPA**



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Before the court are the Parties' Cross-Motions for Summary Judgment and Defendants'

22 Motion to Strike Extra-Record Evidence. The matter came before the court for hearing on  
 23 November 5, 2001, at 10:00 a.m. Appearing for Plaintiffs were Melissa A. Thorme and Tory E.  
 24 Griffin of Downey, Brand, Seymour & Rohwer LLP. Appearing for Defendants was Pamela S.  
 25 Tonglao of United States Department of Justice. The court, after reviewing all the papers filed in  
 26 conjunction with the parties' cross-motions and considering the parties' statements at the hearing  
 27 on this matter, issued its ruling at the conclusion of the hearing. The court now enters the  
 28 following formal order consistent with its ruling at the conclusion of the hearing in this matter.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REMANDING TO EPA

# I. FACTUAL BACKGROUND

1. In 1988, pursuant to State law, the California State Water Resources Control Board ("SWRCB") issued a "Sources of Drinking Water" policy known as SWRCB Resolution No. 88-63. (AR 1013-14.) This policy declares that "[a]ll surface and ground waters of the state are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards *with the exception of:*"

1. Surface and ground waters where: . . . b. There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices....; and

2. Surface waters where: . . . a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards....

(AR 1013)(emphasis added).

2. The publicly owned treatment works ("POTWs") owned and operated by Plaintiffs discharge into waters that may fit within both of the exceptions to the SWRCB's Sources of Drinking Water Policy mentioned above. (AR 850-51; see also Complaint, ¶¶ 9, 11, 12, and 14; EPA's Answer, ¶¶ 9, 11, 12, and 14.)

3. Between 1989 and 1997, four different sets of changes to the Los Angeles Region's basin plan were sent to EPA for approval pursuant to the requirements of the Clean Water Act ("CWA") § 303 [33 U.S.C. § 1313].

4. The LA-RWQCB adopted Resolution No. 89-03 on March 27, 1989, to incorporate the SWRCB's "Sources of Drinking Water" policy into the Basin Plan. (AR 717-18.) This resolution, entitled "Incorporation of Sources of Drinking Water Policy into the Water Quality Control Plans (Basin Plans)," states, in pertinent part, as follows:

Water bodies within the Region that do not have beneficial uses designated for them in Table 4 (in the updated Appendices with the 1978 revisions) are assigned MUN designations in accordance with the provisions of State Water Resources Control Board Resolution No. 88-63 which is, by reference, a part of these Basin Plans.

These MUN designations in no way affect the presence or absence of other beneficial use designations in these water bodies.

(AR 717-18 (emphasis added).)

5. Although "Table 4" was referenced in Resolution No. 89-03 and in EPA's May 26, 2000 letter, it was not included in the Administrative Record before EPA. As a result, it is impossible to discern solely from the Administrative Record exactly which water bodies in the LA Region were first given the MUN designation as a result of the 1989 basin plan amendments.

6. On April 12, 1989, the LA-RWQCB issued a memorandum explaining Resolution No. 89-03. This memorandum states that pursuant to Resolution No. 89-03, waters listed in "Table 4 (as amended in 1978)" as having an existing MUN designation would maintain that designation; water bodies listed in the Basin Plan without an existing MUN designation would retain this designation as water quality information indicated that these water bodies *were not suitable or potentially suitable as a source of drinking water*; and, finally, waters that were not listed in the Basin Plan would be automatically designated as having an MUN use pursuant to SWRCB Res. No. 88-63. (ER 1-2 (emphasis added).)

7. Table 4, submitted by Plaintiffs as extra-record evidence, shows that most, if not all, of the waters to which Plaintiffs discharge already had beneficial uses assigned to them, none of which consisted of an existing or potential MUN use. (ER 3-6.)

8. Resolution 94-07, entitled "Water Quality Control Plan: Los Angeles Region" (herein referred to as the "1994 Basin Plan"), was adopted by the LA-RWQCB on or about June 13, 1994 and approved by the SWRCB on November 17, 1994. (AR 770-71, 774-76.) This Basin Plan amendment included substantial changes to the Region's earlier basin plan and superseded all previous basin plans and amendments thereto.

9. In the first draft of the 1994 Basin Plan, the LA-RWQCB apparently changed course from its prior action taken pursuant to it Resolution No. 89-03, and proposed new language stating its intent to honor the SWRCB's "Sources of Drinking Water" policy.

10. Instead of reviewing the exceptions stated in the SWRCB's Sources of Drinking Water Policy and only designating as MUN those waters that did not meet any exception under

1 the SWRCB's Policy, the LA-RWQCB proposed a blanket designation of all inland surface and  
2 ground waters as MUN. (AR 859; see AR 802.) Several parties, including many of the Plaintiffs  
3 in this action, submitted extensive comments explaining the serious problems inherent in this  
4 blanket MUN designation. (AR 777-81, 788-91, 811, 1104-07, 1144.)

5 11. In response to comments from interested parties, the LA-RWQCB elected to  
6 conditionally designate and not finally designate as having an MUN use those water bodies  
7 identified by a "\*" for the MUN use in Table 2-1 of the Basin Plan. (AR 811, 859-60, 1104-07,  
8 1144, 1472-74, 1479.) Thus, the LA-RWQCB decided water bodies identified as having an  
9 asterisked ("\*") MUN use in Table 2-1 of the 1994 Basin Plan would not be subject to new  
10 effluent limitations based on the conditional MUN use until such time as the LA-RWQCB met  
11 its self-imposed condition to conduct yet another water-body specific analysis to determine  
12 whether any of asterisked MUN water bodies should be designated MUN in light of the  
13 exemptions listed in the Sources of Drinking Water Policy. (Id.) Moreover, the LA-RWQCB  
14 determined that a special Basin Plan amendment would be needed to implement any exemptions  
15 under the SWRCB's Sources of Drinking Water Policy or to remove the condition (indicated by  
16 an "\*") from any conditionally designated MUN use. (AR 860).

17 12. The LA-RWQCB's intent to only conditionally designate and not finally designate  
18 as MUN those water bodies identified by an asterisk ("\*") for the MUN use in Table 2-1 of the  
19 Basin Plan, without further action, is clear. Thus, without further action, the asterisked MUN use  
20 in Table 2-1 of the 1994 Basin Plan is not a "designated use" as defined in 40 C.F.R. §131.3(f).

21 13. On May 26, 2000, EPA sent a letter to the acting Executive Director of the  
22 SWRCB approving in total the 1989, 1990, and 1997 amendments to the LA Basin Plan. (AR 2-  
23 18.)

24 14. In its May 26, 2000 letter, EPA approved all of the 1994 Basin Plan with the  
25 exception of the one sentence suspending the application of the conditional MUN use for waters  
26 identified by an asterisk ("\*") for the MUN use in Table 2-1 of the Basin Plan. (AR 2-3, 12-13.)

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## II. LEGAL BACKGROUND

### A. Standard of Review

1. This is an action for judicial review of an agency action brought under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 *et seq.* The standard of review under the APA is set forth in 5 U.S.C. § 706. The standards enumerated in 5 U.S.C. § 706 act independently of one another, such that an agency's action must be overturned if it falls within any of the provisions of section 706(2). See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 n.2 (10<sup>th</sup> Cir. 1994).

2. In reviewing the propriety of EPA's action, the court must conduct a review of the agency's actions that is "searching and careful," Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9<sup>th</sup> Cir. 1993), and must determine whether EPA "considered the relevant factors and whether there has been a clear error of judgment." Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 966 F.2d 1292, 1297 (9<sup>th</sup> Cir. 1992); see Southern Pacific Trans. Co. v. Interstate Commerce Comm'n, 871 F.2d 838, 846 (9<sup>th</sup> Cir. 1989)(the searching and careful inquiry determines whether the agency has articulated a "rational connection between the facts found and the choice made"); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed. 2d 136 (1971)(the APA standard of review does not shield agency action from a "thorough, probing, in-depth review").

3. The court "may not supply a reasoned basis for the agency's actions that the agency itself has not given." Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Thus, the agency's actions "must be upheld, if at all, on the basis articulated by the agency itself." Id. at 50.

4. The "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973); see 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"). In some circumstances, however, the court may consider evidence not found in the administrative record – often referred to as "extra record evidence" – to determine whether the agency acted within the scope of its authority and whether its action was justified. See

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1 Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9<sup>th</sup> Cir.  
2 1996).

3 **B. The Clean Water Act**

4 1. Under the CWA, States are delegated the primary responsibility for setting water  
5 quality standards. 33 U.S.C. §§ 1313(c), (e)(3)(F); see Chevron U.S.A., Inc. v. Hammond, 726  
6 F.2d 483, 489 (9<sup>th</sup> Cir. 1984).

7 2. Each State must set "water quality standards" which consist of "the designated  
8 uses of the navigable waters involved and the water quality criteria for such waters based upon  
9 such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i). Generally, "uses" are the water  
10 quality goals for the water body to be achieved and protected (e.g., recreation, aquatic life). At a  
11 minimum, States must revise their water quality standards to reflect "existing uses" (i.e. those  
12 uses actually attained in the water body on or after November 28, 1975.) 40 C.F.R. §§ 131.3(e),  
13 131.10(i). In contrast to uses, "water quality criteria" are the in-stream or ambient water quality  
14 conditions necessary to protect the designated uses of a water body. 40 C.F.R. § 131.3(b).

15 3. Water quality criteria can be expressed either as numeric or narrative criteria.  
16 Numeric criteria are specific chemical concentration limits (e.g., no more than 5 mg/l of pollutant  
17 X), and narrative criteria are descriptive statements rather than specific numeric limits (e.g., "no  
18 toxics in toxic amounts"). Numeric criteria are usually preferred because of their easy  
19 calculation and enforceability, and are required for all toxic pollutants listed pursuant to CWA  
20 Section 307(a)(1) [33 U.S.C. § 1317(a)(1)] for which advisory criteria guidance has been  
21 published under CWA Section 304(a) [33 U.S.C. § 1314(a)], the discharge or presence of which  
22 in the affected waters could reasonably be expected to interfere with the designated uses adopted  
23 by the State. 33 U.S.C. § 1313(c)(2)(B).

24 4. Under CWA section 304(a), EPA is required to publish new and revised "criteria  
25 documents" to help the States develop water quality criteria that reflect the latest scientific  
26 knowledge. 33 U.S.C. § 1314(a)(1). EPA regulations further provide that States should develop  
27 numeric criteria based on the EPA's criteria guidance under CWA section 304(a), EPA's criteria  
28 guidance modified to reflect site-specific conditions, or other scientifically defensible methods.

1 See 40 C.F.R. § 131.11(b)(1); 48 Fed. Reg. 51,400, 51,411 (1983). These requirements ensure  
2 that the criteria adopted by the States are tailored to each State's own particular conditions.

3 5. Where the EPA has published numeric criteria guidance for specific toxic  
4 pollutants under CWA section 304(a) [33 U.S.C. § 1314(a)], and it is determined that the specific  
5 pollutant can reasonably be expected to interfere with the States' designated uses of their waters,  
6 the States must adopt numeric water quality criteria for such toxic pollutants. 33 U.S.C. §  
7 1313(c)(2)(B). In lieu of adopting numeric criteria, EPA allows States to adopt a translator  
8 procedure to translate its narrative criteria into numeric criteria. (See 57 Fed. Reg. 60853, 60873  
9 (Dec. 22, 1992)). For toxic pollutants, where a State adopts narrative criteria to protect  
10 designated uses, the State must "provide information identifying the method by which the State  
11 intends to regulate point source discharges of toxic pollutants on water quality limited segments  
12 based on such narrative criteria." 40 C.F.R. § 131.11(a)(2). These procedures provide the public  
13 and regulated community with fair notice of what is expected of them, and also ensure that the  
14 narrative criteria have clear bounds and a rational basis for their implementation.

15 6. Once the State adopts new or revised water quality standards, the State must  
16 submit these standards to EPA for either approval or disapproval. 33 U.S.C. §1313(c). Upon  
17 approval by EPA, the State standards become the "applicable water quality standards" for  
18 purposes of the CWA. 33 U.S.C. § 1313(c)(3); see 33 U.S.C. § 1313(c)(2)(A); Alaska Clean  
19 Water Alliance v. Clarke, No. C96-1762R, 1997 U.S. Dist. LEXIS 11144, at \*8 (W.D. Wash.,  
20 July 8, 1997) ("Congress did not intend new or revised state standards to be effective until after  
21 EPA had reviewed and approved them").

22 7. If EPA determines, within 60 days after submission of a new or revised State  
23 water quality standard, that it meets requirements of the CWA, that standard becomes the  
24 "applicable water quality standard" for the applicable waters of that State. 33 U.S.C.  
25 §1313(c)(3); 40 C.F.R. § 131.21(a)(1). Alternatively, if EPA rejects a State's proposed  
26 standards, EPA must so notify the State within 90 days of submission, and specify the changes  
27 necessary for the State to make in order to meet the requirements. 33 U.S.C. § 1313(c)(3); 40  
28 C.F.R. § 131.21(a)(2).

### III. CONCLUSIONS OF LAW

1  
2 1. Plaintiffs have standing to bring their first claim for relief, including Plaintiffs' challenge to EPA's disapproval of the LA-RWQCB's implementation policy.

3  
4 2. EPA's May 26, 2000 letter, including its disapproval of the LA-RWQCB's implementation policy, was a final agency action subject to review under the APA. See  
5  
6 Defenders of Wildlife v. Browner, 909 F.Supp. 1342, 1346 (D. Ariz. 1995) ("The EPA took final  
7 action when it issued disapprovals [of Arizona's proposed water quality standards] on September  
8 9, 1993, and April 29, 1994."); Appalachian Power Co. v. Environmental Protection Agency, 208  
9 F.3d 1015 (D.C. Cir. 2000); see also Bennett v. Spear, 520 U.S. 154, 177-78, 117 S.Ct. 1154,  
10 137 L.Ed.2d 281 (1997) (quotations omitted); State of Alaska v. United States Environmental  
11 Protection Agency, 244 F.3d 748, 750 (9<sup>th</sup> Cir. 2001).

12 3. Plaintiffs' first claim for relief, including plaintiffs' challenge to EPA's  
13 disapproval of the implementation policy, is ripe for judicial review. See Municipality of  
14 Anchorage v. City of Craig, 980 F.2d 1320, 1323 (9<sup>th</sup> Cir. 1992); Trustees for Alaska v. Hodel,  
15 806 F.2d 1378, 1381 (9<sup>th</sup> Cir. 1986).

16 4. EPA's action to partially approve and partially disapprove the 1994 Basin Plan  
17 amendment was arbitrary, capricious, an abuse of EPA's discretion, and contrary to the  
18 requirements of the CWA.

19 5. The water quality standards set by the State must be consistent with the  
20 requirements of the CWA. Except as necessary to protect existing uses, the CWA does not  
21 require any water quality standard more stringent than necessary for the protection of the CWA's  
22 default fishable/swimmable use. See 33 U.S.C. § 1251(a)(2) (goal of CWA is to provide,  
23 "wherever attainable," "for the protection and propagation of fish, shellfish, and wildlife and  
24 provide[] for recreation on the water"); see also Friends of the Earth, Inc. v. Gaston Copper  
25 Recycling Corp., 204 F.3d 149, 156 (4<sup>th</sup> Cir. 2000) ("[o]ne of the well-recognized aims of the Act  
26 is to ensure that the nation's waterways are fishable and swimmable").

27 6. EPA reviews new or revised water quality standards for compliance with the  
28 minimum requirements of the CWA. 33 U.S.C. § 1313(c)(3). If EPA determines that a State's



1 standards meet these requirements, EPA must approve such standards as consistent with the  
2 CWA. Id.

3 7. Nothing in the administrative record before EPA suggests an intent on the part of  
4 either the State or the LA-RWQCB to impose effluent limitations associated with the MUN use  
5 on waters to which plaintiffs discharge. In fact, the administrative record before EPA clearly  
6 indicates to the contrary. (AR 811, 859-60, 862-71, 1104-05, 1107-08, 1144, 1472-74, 1479.)

7 8. The LA-RWQCB did not designate the MUN use for those waters identified by an  
8 asterisk ("\*") in Table 2-1 of the Basin Plan because it expressly indicated that such designation  
9 was conditioned upon a future "detailed review of criteria in the State Sources of Drinking Water  
10 Policy" and an identification of "those waters in the Region that should be excepted from the  
11 MUN use designation." (AR 860).

12 9. Because the LA-RWQCB did not unconditionally designate an MUN use for  
13 those waters identified by an asterisk ("\*") in Table 2-1 of the 1994 Basin Plan, it was an abuse  
14 of discretion for EPA to simultaneously approve the MUN use designation and disapprove the  
15 LA-RWQCB's implementation policy. Here, there is no dispute that the water bodies regulated  
16 by the LA-RWQCB met the minimum requirements of the CWA, since each of the waters were  
17 identified in the Basin Plan as having "fishable/swimmable" uses. (AR 862-71.) Moreover,  
18 because the MUN use was only conditionally designated, it was not inconsistent with the CWA  
19 for the State to defer implementation of that use pending completion of further study. (AR 859-  
20 60). Thus, EPA overstepped its bounds and abused its discretion under the CWA when it  
21 approved the LA-RWQCB's conditional designation of the MUN use and disapproved the LA-  
22 RWQCB's corresponding implementation policy.

23 10. When the LA-RWQCB adopted narrative water quality criteria for toxic  
24 pollutants governed by 33 U.S.C. § 1313(c)(2)(B) in the 1994 Basin Plan, EPA improperly failed  
25 to ensure that the LA-RWQCB adopted a translator procedure to translate its narrative criteria  
26 into numeric criteria. Absent a translator procedure, the LA-RWQCB's narrative criteria did not  
27 satisfy 33 U.S.C. § 1313(c)(2)(B). In addition, in reviewing the LA-RWQCB's narrative criteria  
28 relating to toxic pollutants, EPA improperly failed to ensure that the LA-RWQCB set forth

1 sufficient "information identifying the method by which the State intends to regulate the point  
2 source discharges of toxic pollutants on water quality limited segments based on such narrative  
3 criteria." 40 C.F.R. § 131.11(a)(2); see AR 294.

4 11. Plaintiffs' Second and Third Claims for Relief are moot in light of the court's  
5 Order set forth below.

6 **ORDER**

7 Based on the findings of fact and conclusions of law set forth above, IT IS HEREBY  
8 ORDERED as follows:

9 1. Plaintiffs' motion for summary judgment as to their first claim for relief is  
10 GRANTED for the reasons stated above. The matter is remanded to the EPA to, consistent with  
11 the court's decision as set forth above:

- 12 a. approve the 1994 Basin Plan and implementation policy in whole;  
13 b. disapprove the 1994 Basin Plan and implementation policy in  
14 whole; or  
15 c. partially approve and partially disapprove the 1994 Basin Plan in  
16 such a way as to preserve the LA-RWQCB's intention not to immediately  
17 subject the waters identified by an asterisk ("\*") for the MUN use  
18 designation in Table 2-1 of the 1994 Basin Plan to the stringent criteria  
19 necessary to protect the MUN use designation for such waters absent  
20 further study.

21 2. EPA shall take action in accordance with paragraph 1 of this order within 60 days  
22 from the date of filing of this order.

23 3. Plaintiffs' motions for summary judgment as to their second and third claims for  
24 relief are moot in light of the court's order.

25 4. Defendants' motion for summary judgment is DENIED.

26 5. Defendants' motion to strike extra-record evidence is DENIED.

27 6. On remand, EPA should make its determination in accordance with the findings  
28 of fact and conclusions of law in this order, and consistent with the administrative record and

1 other evidence submitted to this court.

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3 Dated: Dec. 18, 2001

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Presented by:

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DATED: December 14, 2001

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Approved as to form by:

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DATED: December \_\_, 2001

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By: 

The Honorable Manuel L. Real  
United States District Judge

SCANNED

DOWNEY, BRAND, SEYMOUR & ROHWER LLP

By: 

TORY E. GRIFFIN  
Attorneys for Plaintiffs

By: [Signature on Next Page]

Pamela S. Tonglao  
Attorneys for Defendants

DOWNEY, BRAND, SEYMOUR & ROHWER LLP

1 other evidence submitted to this court.

2

3 Dated: \_\_\_\_\_

By: \_\_\_\_\_

The Honorable Manuel L. Real  
United States District Judge

SCANNED

5 Presented by:

6 DATED: December \_\_\_, 2001

DOWNEY, BRAND, SEYMOUR & ROHWER LLP

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8

By: \_\_\_\_\_

TORY E. GRIFFIN  
Attorneys for Plaintiffs

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12 Approved as to form by:

13 DATED: December 14, 2001

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENTAL DEFENSE SECTION

14

15

By: Pamela S. Tonglao

Pamela S. Tonglao  
Attorneys for Defendants

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