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Re: Test Claim for Unfunded Mandates Relating to California Water Quality Control Board, San Francisco Region, Permit No. CAS612008, issued as Order No. R2-2009-0074 (October 14, 2009) – City of San Jose's Reply

Dear Mr. Bohan:

This is a reply to letters by the San Francisco Bay Regional Water Quality Control Board and California Department of Finance, dated May 17, 2011, in opposition to City of San Jose's Test Claim dated November 29, 2010.

Most of the issues in San Jose's Test Claim are also part of the County of Santa Clara's Test Claim No. 10-TC-03. Therefore, this reply focuses on issues related to Provision C.2, unique to San Jose's Claim.

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Introduction

The City of San Jose is eligible for a subvention because Provision C.2 in the Municipal Regional Stormwater Permit No. CAS612008 issued on October 14, 2009 ("New Permit")¹ constitutes a new program or higher level of service. While the prior permit allowed San Jose discretion on how to control discharges to the maximum extent practicable by developing a Management Plan, the New Permit mandates specific means of compliance with the maximum-extent-practicable standard. Provision C.2 constitutes a state mandate because it requires activity beyond what is required by federal law. Rather than suggest means of compliance with the general provisions of federal law, as in the prior permit, the state freely chose to require certain specific acts, thus exceeding the federal mandate. As a result of the increased requirements on municipal operations San Jose will incur significant costs. San Jose has inadequate fee authority to recover all those costs.

Argument

1. Provision C.2 Constitutes "a New Program or Higher Level of Service."

a. The New Permit Contains Additional Requirements.

The Water Board claims that the New Permit does not impose a new program or higher level of service because "[m]any of the Provisions are very similar to those in Claimants' prior permits or to those in plans that Claimants' prior permits required that they implement. Other activities, even if not previously required, are already being carried out by some of the Permittees."² The Water Board argues that the "maximum extent practicable" ("MEP") approach is flexible and that it evolves as technical knowledge about controlling urban runoff expands.³ According to the Water Board, because the Clean Water Act always included the "maximum extent practicable" standard for MS4⁴ permits, any additional specific pollution controls designed to implement the maximum-extent-practicable standard cannot constitute a new program or higher level of service.⁵

¹ Exhibit 1 to San Jose's Test Claim.

² Water Board's Opposition at 16.

³ *Id.* at 10.

⁴ MS4 stands for "municipal separate storm sewer system" under 40 C.F.R. §122.26(b)(19), and is defined as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) . . . owned or operated by a State, city, town . . . or other public body . . ." 40 C.F.R. §122.26.(b)(8).

⁵ *Id.* at 16.

This Commission has considered and rejected that argument before. In the 2009 San Diego MS4 Permit Decision,⁶ the Department of Finance argued that more specific pollution controls present in the new permit were not actually new requirements because they became necessary to keep MS4s in compliance with the federal maximum-extent-practicable standard.⁷ The Commission noted that additional requirements constitute a state mandate if they "exceed the mandate in federal law."⁸ Correctly relying on the case of *Long Beach Unified School District v. State of California*,⁹ the Commission decided that the more specific obligations that expanded the requirements of the prior more general permit were a new program or a higher level of service.¹⁰

In *Long Beach*, a school district filed a claim with the state for reimbursement based on a state executive order and state regulations that required local school boards to make certain expenditures to alleviate racial and ethnic segregation in schools.¹¹ The *Long Beach* court explained that when case law required a "reasonably feasible" plan but the state chose to impose specific steps to comply with it, the state's specific requirements constituted a higher level of service:

Where courts have *suggested* that certain steps and approaches may be helpful, the [state's] Executive Order and guidelines *require* specific actions. . . . While all these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.¹²

In order to determine whether Provision C.2 of the New Permit constitutes "a new program or a higher level of service" under California Constitution article XII B, section 6, one must compare Provision C.2 to the legal requirements in effect immediately before its adoption,¹³ i.e. to the Board's Permit No. CAS029718, issued in 2001 ("Prior Permit").¹⁴

⁶ *In Re Test Claim on San Diego Regional Water Quality Control Board Order No. 01-182*, adopted July 31, 2009 ("San Diego MS4 Permit Decision").

⁷ *Id.* at 48-49.

⁸ *Id.* at 40 (citing *Long Beach Unified School Dist. v. California* (1990) 225 Cal.App.3d 155, 173).

⁹ (1990) 225 Cal.App.3d 155.

¹⁰ San Diego MS4 Permit Decision at 49.

¹¹ *Long Beach Unified School Dist.*, 225 Cal.App.3d at 163-64.

¹² *Id.* at 173 (emphasis in the original).

¹³ See *San Diego Unified School Dist. v. Comm'n on State Mandates* (2004) 33 Cal.4th 859, 878 (statutory requirements provided a higher level of service to the public because they were "new in comparison with the preexisting scheme" and were intended to provide an enhanced service to the public); see also *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 (requiring school districts to contribute part of the cost of educating pupils from the district at state schools for the severely

i. Provision C.2.b

Provision C.2.b imposes more specific requirements on the City than the old plan. For example, under the New Permit, the City is required to implement best management practices ("BMPs") for parking garages and gas station fueling areas.¹⁵ The City must also follow the Mobile Surface Cleaner Program of the Bay Area Stormwater Management Agencies Association rather than devise its own program. These additional legal requirements go beyond the Prior Permit and thus create a new program or heightened level of service.¹⁶

The Water Board errs by comparing the requirements of the New Permit to the practices that San Jose adopted in the 2004 Urban Runoff Management Plan.¹⁷ Although the Management Plan contains many provisions similar to those in the New Permit, the City could have abandoned the practices set forth in it and adopted different ones in a subsequent Management Plan if appropriate alternatives were found.¹⁸ Unlike the 2004 Management Plan, the New Permit codifies specific actions that the City must take from now on.¹⁹ Section C.2.b of the New Permit therefore creates a new program or heightened level of service.

ii. Provision C.2.c

Similarly, Provision C.2.c creates specific requirements not present in the Prior Permit.²⁰ The New Permit requires the City to implement best management practices and create reports on implementation specifically for maintenance of bridges and structures and for graffiti removal. The New Permit also specifies that the amount of discharge allowed from bridge and structure maintenance and graffiti removal is zero: the permit requires the City to "prevent all debris . . . from entering storm drains or water courses," and to "prevent any discharge of debris . . . from entering storm drains or watercourses." That is a more stringent requirement than in the Prior Permit, which required the City to create Performance Standards that limited discharge to the

handicapped was a new program because, prior to enactment of statute, school districts had not been required to contribute to education of students from their districts at such schools).

¹⁴ Exhibit 2 to San Jose's Test Claim.

¹⁵ Attachment A hereto contains a table that sets forth the relevant provisions of the two permits side by side for comparison.

¹⁶ *San Diego Unified School Dist.*, 33 Cal.4th at 878.

¹⁷ See Water Board's Opposition at 60.

¹⁸ See Santa Clara County 2001 Permit, Provision C.2.b.

¹⁹ Gov't Code §17565 ("If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate.")

²⁰ Attachment A hereto contains a table that sets forth the relevant provisions of the two permits side by side for comparison.

maximum extent practicable, thus allowing for some discharge where it would be impracticable to prevent.

The Water Board notes that the City already complies with Provision C.2.c of the New Permit through its Annual Work Plans, which revised the Prior Permit. But as with Provision C.2.b above, the New Permit now specifically dictates future performance. It is immaterial to the finding of a new program that the City incurred costs of taking an action before it was mandated by the state.²¹ Provision C.2.c represents more specific requirements that were not mandated by the Prior Permit and, therefore, constitutes a new program or heightened level of service.

iii. Provision C.2.e

Provision C.2.e also contains additional requirements that constitute a new program or heightened level of service.²² For example, under the New Permit, the City must now notify the Water Board, Department of Fish and Game, and the Army Corps of Engineers before beginning rural road maintenance or construction, the City must specifically prioritize construction projects, ensure that no barriers to migratory fish are created, develop an inspection program for all rural roads, replace shotgun culverts, re-grade unpaved rural roads to slope outward, and provide training twice per permit term. The Performance Standards under the Prior Permit focused on implementing appropriate best management practices when performing maintenance activities, and included Model BMPs to be used as guidance for compliance. The New Permit requirements are more specific and have broader scope than the Performance Standard. For example, the Prior Permit required that practices be implemented to minimize impacts caused by maintenance activities, whereas the New Permit mandates practices to minimize environmental impacts regardless of planned maintenance activities, thus requiring more maintenance and inspections to identify threats to the environment. These additional requirements go beyond the Prior Permit and thus create a new program or heightened level of service.²³

As with Provision C.2.b above, the Water Board errs by comparing the requirements of the New Permit to the practices that San Jose adopted in previous Management Plans.²⁴ Unlike the Management Plan, the New Permit codifies specific

²¹ Gov't Code § 17565 ("If a local agency . . . at its option has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency . . . for those costs incurred after the operative date of the mandate.").

²² Attachment A hereto contains a table that sets forth the relevant provisions of the two permits side by side for comparison.

²³ San Diego Unified School Dist., 33 Cal.4th at 878.

²⁴ Water Board's Opposition at 61-62.

actions that the City must take from now on.²⁵ Section C.2.e of the New Permit therefore creates a new program or heightened level of service.

iv. Provision C.2.f

Provision C.2.f requires the City to implement and maintain a site specific Stormwater Pollution Prevention Plan ("SWPPP") for corporation yards and material storage facilities that are not already covered under the state's NPDES general permit. Specifically, this provision requires that each SWPPP incorporate "all applicable BMPs [Best Management Practices] that are described in the California Stormwater Quality Association's Handbook for Municipal Operations and the Caltrans Storm Water Quality Handbook Maintenance Staff Guide, May 2003, and its addenda, as appropriate."²⁶

The Water Board recognizes that incorporating best management practices from these handbooks creates more specificity, but argues that the phrase "as appropriate" leaves the City with the same amount of discretion and flexibility that it had under the Prior Permit.²⁷ The Water Board is incorrect because "as appropriate" merely refers to the factual situation in which it would be appropriate to apply a best management practice from one of the handbooks. For example, it might not be appropriate to implement a best management practice regarding discharge from one type of industrial facility to another type of facility that commonly releases another type of pollutant. Under the New Permit, the City does not retain the flexibility to choose from a larger suite of practices or to devise its own best management practice. Since Provision C.2.f mandates a more specific and more limited set of best management practices than under the Prior Permit, it imposes a new program or heightened level of service.²⁸

b. The City Must Seek a Permit for Storm-Water Runoff.

The Water Board also argues that the New Permit is not a new program because the City allegedly elected to discharge storm water into a body of water, thus choosing to subject itself to the MS4 permit requirements.²⁹ The Water Board asserts that neither federal nor state law requires the City to discharge storm water, thus applying for a permit is discretionary.³⁰ The Water Board argues that the City could contain all of its storm-water runoff and deliver it to a treatment plant in order to avoid discharging any storm water.³¹ According to the Water Board, the Commission erred in the San Diego

²⁵ Gov't Code §17565; San Diego MS4 Decision at 53-54 (new specific requirements interpreting Maximum Extent Practicable standard created a heightened level of service).

²⁶ Attachment A hereto contains a table that sets forth the relevant provisions of the two permits side by side for comparison.

²⁷ Water Board's Opposition at 62.

²⁸ San Diego Unified School Dist.33 Cal.4th at 878.

²⁹ Water Board's Opposition at 17.

³⁰ *Id.* at 17.

³¹ *Id.* at 17, n.83.

MS4 Decision when it relied on the decision in *Department of Finance v. Commission on State Mandates (Kern High School District)*³² when it concluded that dischargers of pollutants who are compelled to seek permits are not voluntarily participating in the permit program.

The Water Board presents no evidence that even if the City diverted its storm-water run-off to a treatment plant it would be able to contain 100% of that runoff in its jurisdiction and thus avoid having to seek a permit under federal law. Federal law requires "any person who discharges or proposes to discharge pollutants" to obtain a permit "to implement a program to monitor and control pollutant discharges."³³

Unlike here, in the *Kern High School District* decision the school in question could avoid state law requirements by simply not adopting a district council.³⁴ In the present case, both federal and state law require permits for MS4s.³⁵ Thus, the City is required to seek a permit.

2. Provision C.2 Mandates Activity Beyond Federal Law.

The Water Board and the Department of Finance claim that Provision C.2 is required by federal law.³⁶ The Water Board relies on *Building Industry Association of San Diego County v. State Water Board*³⁷ for the proposition that state Water Boards are entitled to considerable deference when deciding what actions are necessary to meet the federal requirement that dischargers reduce pollution to the maximum extent practicable.³⁸ The Water Board is incorrect. The *Building Industry Association* case does not even apply to the present situation. There, the Association challenged the Water Board's permit claiming that the permit violated federal law because it created requirements more stringent than the federal maximum-extent-practicable standard.³⁹ Even though the court found that federal law did not prohibit the Water Board from imposing controls that were more stringent than the maximum-extent-practicable standard,⁴⁰ the court did not analyze what is at issue here -- whether these more stringent controls were state or federal mandates. Nor did the *Building Industry Association* court decide whether the Water Board would be entitled to deference when determining whether such controls are required by state or federal mandate.

³² (2003) 30 Cal.4th 727.

³³ 40 C.F.R. § 122.21(a) & 122.26(d)(2)(iv)(C).

³⁴ See *Kern High School Dist.* 30 Cal.4th 727, 745.

³⁵ 40 C.F.R. §122.21(a); Cal. Water Code §13376. See also San Diego MS4 Decision at 34 ("permit activities were not taken at the option or discretion of the Claimants").

³⁶ Water Board's Opposition at 10-11, 17-23, & 63-64; Department of Finance's Opposition at 1-2.

³⁷ (2004) 124 Cal.App.4th 866.

³⁸ Water Board's Opposition at 10-11.

³⁹ *Building Industry Association*, 124 Cal.App.4th at 880.

⁴⁰ *Id.* at 871.

The Water Board also relies on a letter sent to the Board by the U.S. EPA that the EPA expected that new generations of permits would be increasingly specific as the maximum-extent-practicable standard evolved.⁴¹ The EPA letter, however, provides no guidance whether Provision C.2 is a state mandate because it addresses the maximum-extent-practicable standard only generally. The fact remains that the Water Board "freely chose to impose" the costs of specific means of compliance with the maximum-extent-practicable standard upon local governments.⁴²

The Water Board further argues that the Commission misread *Hayes v. Commission on State Mandates* in both its Los Angeles and San Diego MS4 Permit Decisions.⁴³ The Water Board argues that in *Hayes*, the state had the responsibility of ensuring that schools complied with federal law, but that here, MS4s must comply with, and bear the cost of, the federal maximum-extent-practicable standard. Thus, according to the Water Board, the state was not "shifting costs" from itself to local government.⁴⁴ The Board's argument is incorrect because it is predicated on the assumption that the New Permit requirements impose identical costs on local government as the federal maximum-extent-practicable standard. As demonstrated throughout this reply, the Water Board's new and more specific requirements constitute a new program or a heightened level of service that will impose costs exceeding the federal maximum-extent-practicable standard. As in the Los Angeles and San Diego MS4 Permit Decisions, the *Hayes* case applies because the Water Board freely chose to impose more stringent requirements on local government.

The Water Board and the Department of Finance also argue that the Commission erred in its Los Angeles and San Diego MS4 Permit Decisions when it applied the *Long Beach Unified School District* decision.^{45 46} According to the Water Board, the present case is distinguishable from the *Long Beach* case because here the obligations to issue permits are placed directly on the state, whereas in *Long Beach* the federal constitutional requirements applied only to local schools and not to the state. That argument is without merit. In the present case the federal law applies to the state because the state chose to issue permits in lieu of the U.S. EPA.⁴⁷ The state also chose to impose costs that exceed the federal maximum-extent-practicable standard. Thus, the *Long Beach* decision is on point.

⁴¹ Water Board's Opposition at 10 & 64; see also Department of Finance's Opposition at 1.

⁴² *Hayes*, 11 Cal. App. 4th at 1594.

⁴³ Water Board's Opposition at 21-23.

⁴⁴ *Id.* at 22 (quoting *Hayes*, 11 Cal. App. 4th at 1594).

⁴⁵ (1990) 225 Cal.App.3d 155

⁴⁶ Water Board's Opposition at 20; Department of Finance's Opposition at 2.

⁴⁷ CWA § 402(b) [33 U.S.C. §1342(b)] (authorizing state to issue permits); Cal. Water Code §13370 (creating California's permit system).

Finally, to argue that Provision C.2 is required by federal law, the Water Board cites Clean Water Act section 402(p)(3)(B).⁴⁸ But the only substantive requirement for MS4s contained in that section is that MS4s must reduce discharge of pollutants to the maximum extent practicable. As stated in Part 1.a. above, this Commission has already rejected the argument that the federal maximum-extend-practicable standard requires additional specific pollution controls in subsequent permits.⁴⁹

State mandate requirements that exceed the federal requirements are reimbursable.⁵⁰ When the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government."⁵¹ The state may suggest means of compliance with federal law, but when "these steps are no longer merely being suggested as options which the local [government agency] may wish to consider but are required acts [then] [t]hese requirements constitute a higher level of service."⁵² As demonstrated in subparts a through d below, that is what occurred here.

a. Provision C.2.b

The Water Board relies solely on Clean Water Act section 402(p)(3)(B) as to argue that Provisions C.2.b is not a state mandate.⁵³ Provision C.2.b, however, requires specific actions that are not contained in that section. For example, nothing in that section requires MS4s to implement best management practices specific to pavement washing, mobile cleaning and pressure operations located in parking garages, trash areas, gas stations, fueling areas, and sidewalk and plaza cleaning. Nothing in that section requires MS4s to implement the best management practices included in Mobile Surface Cleaner Program of the Bay Area Stormwater Management Agencies Association, or to coordinate with sanitary sewer agencies to determine if disposal to sanitary sewer is available for wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met. Finally, nothing in that section requires annual reports on the implementation of the above provisions. Provision C.2.b requires all the above actions instead of simply suggesting them as means of compliance with the maximum-extent-practicable standard. That

⁴⁸ 33 U.S.C. §1342(p)(3)(B). The text of that provision is set forth in Attachment B to this reply.

⁴⁹ San Diego MS4 Permit Decision at 40 (citing *Long Beach Unified School Dist.*, 225 Cal.App.3d at 173, & Gov't Code §17556).

⁵⁰ *Long Beach Unified School Dist.*, 225 Cal.App.3d at 173 (although California schools have a constitutional duty to eliminate segregation, requirement that they conduct biennial racial surveys was a reimbursable state mandate).

⁵¹ *Hayes v. Comm'n on State Mandates* (1992) 11 Cal. App. 4th 1564, 1594.

⁵² *Id.*

⁵³ The text of CWA §402(p)(3)(B) is set forth in Attachment B hereto. Attachment B contains a table with the text of that statute side by side with the New Permit provisions for comparison.

constitutes a higher level of service.⁵⁴ Provision C.2.b therefore exceeds the mandates of federal law⁵⁵ and is a reimbursable state mandate.

b. Provision C.2.c

In addition to Clean Water Act section 402(p)(3)(B), the Water Board relies on a federal regulation, 40 C.F.R. section 122.26(d)(2)(iv)(A)(1), as evidence that Provision C.2.c is required by federal law. That regulation provides that MS4 permit applications must contain proposed management plans, which in turn must contain: "A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."⁵⁶ Provision C.2.c, however, mandates specific actions not contained in the Clean Water Act or that regulation.

Nothing in either section requires MS4s to create best management practices specific to bridges and structural maintenance directly over water or storm drains, or for graffiti removal. They do not require specific implementation levels for structural maintenance and graffiti removal. Nor do they require protection of storm drains before undertaking graffiti removal or training employees and contractors about capture and disposal methods for waste generated. Finally, nothing in either statute requires annual reports regarding implementation of and compliance with best management practices specific to graffiti removal and bridge and structural maintenance. Because Provision C.2.c mandates all the above actions instead of simply suggesting them as means of compliance with the maximum-extent-practicable standard, that constitutes requirement for a higher level of service.⁵⁷ Provision C.2.c therefore exceeds the mandates of federal law⁵⁸ and is a reimbursable state mandate.

c. Provision C.2.e

The Water Board relies solely on Clean Water Act section 402(p)(3)(B) with respect to Provision C.2.e. That provision, however, mandates specific actions not contained in the Clean Water Act.

Nothing in the Clean Water Act requires MS4s to implement and require contractors to implement best management practices for erosion and sediment control during and after construction for maintenance activities on rural roads; notify the Water Board, the California Department of Fish and Game and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands; develop and implement

⁵⁴ *Long Beach Unified School Dist.*, 225 Cal.App.3d at 173.

⁵⁵ *See Hayes*, 11 Cal. App. 4th at 1594.

⁵⁶ 40 C.F.R. §122.26(d)(2)(iv)(A)(1). The text of that regulation is set forth in Attachment B below.

⁵⁷ *Long Beach Unified School Dist.*, 225 Cal.App.3d at 173.

⁵⁸ *See Hayes, supra*, 11 Cal. App. 4th at 1594.

best management practices for erosion and sediment control measures. Nothing in the Clean Water Act requires MS4s to develop and implement appropriate best management practices for road design, construction, maintenance, and repairs in rural areas that prevent and control road-related erosion and sediment transport; identification and prioritization of rural road maintenance on the basis of soil erosion potential, slope steepness, and stream habitat resources; construction of roads and culverts that do not impact creek functions or create migratory fish passage barrier, where migratory fish are present, or lead to stream instability; development and implementation of an inspection program to maintain rural roads' structural integrity and prevent impacts on water quality; maintenance of rural roads adjacent to stream and riparian habitat to reduce erosion, replace damaging shotgun culverts and excessive erosion; re-grading of unpaved rural roads to slope outward where consistent with road engineering safety standards, and installation of water bars as appropriate; and replacement of existing culverts or design of new culverts or bridge crossings using measures to reduce erosion, provide fish passage and maintain natural stream geomorphology in a stable manner. Nothing in section 402(p)(3)(B) requires MS4s to provide or implement training on the above provisions. Finally, nothing in that section requires annual reports on the implementation of the above provisions.

Provision C.2.e requires all the above actions, instead of suggesting them as means of compliance with the maximum-extent-practicable standard, which constitutes a higher level of service.⁵⁹ Provision C.2.e therefore exceeds the mandates of federal law⁶⁰ and is a reimbursable state mandate.

d. Provision C.2.f

In addition to Clean Water Act section 402(p)(3)(B), the Water Board relies federal regulation at 40 C.F.R. section 122.26(d)(2)(iv)(A)(5)⁶¹ to argue that Provision C.2.f is required by federal law. That regulation provides that MS4 permit applications must contain proposed management plans, which in turn must contain "[a] description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges." Provision C.2.f, however, mandates specific actions not contained in either CWA section 402(p)(3)(B) or the above regulation.

Nothing in either section mandates that MS4s prepare specific Best management practices for corporation yards that include municipal vehicle maintenance, heavy equipment and maintenance vehicle parking areas, and material storage facilities. Nothing in either section requires that each site specific plan incorporate all applicable

⁵⁹ *Long Beach Unified School Dist.*, 225 Cal. App. 3d at 173.

⁶⁰ *See Hayes*, 11 Cal. App. 4th at 1594.

⁶¹ The text of 40 C.F.R. §122.26(d)(2)(iv)(A)(5) is set forth in Attachment B below.

best management practices that are described in the California Stormwater Quality Association's Handbook for Municipal Operations and the Caltrans Storm Water Quality Handbook Maintenance Staff Guide, May 2003, and its addenda. These sections do not require that inspections be performed before the rainy season, that all vehicle and equipment wash areas be plumbed to the sanitary sewer after coordination with the local sanitary sewer agent and equipped with a pretreatment device, that dry cleanup methods be used when cleaning dry debris or spills from corporation yards, or that outdoor storage areas containing waste pollutants be covered and/or bermed. Finally, nothing in either section requires annual reports regarding implementation of the above provisions and inspections about compliance with them. Provision C.2.f, however, requires all the above actions instead of simply suggesting them as means of compliance with the maximum-extent-practicable standard, thus requiring a higher level of service.⁶² Provision C.2.f exceeds the mandates of federal law⁶³ and consequently is a reimbursable state mandate.

3. The Requirements of Provision C.2 Are Unique to Local Government.

To be eligible for subvention under article XIII B section 6 of the California Constitution, a program must impose unique requirements on local agencies to implement a state policy.⁶⁴ The program will not be eligible for subvention if it applies generally to all residents and entities in the state.⁶⁵

Citing *City of Richmond v. Commission on State Mandates*,⁶⁶ the Board and the Department argue that the NPDES permit system does not impose actions unique to local government⁶⁷ because it also regulates private industry, whose permits are more stringent than municipal permits.⁶⁸ That approach is incorrect and has been rejected in *County of Los Angeles v. Commission on State Mandates*.^{69 70} There, the court stated that "applicability of permits to public and private dischargers does not inform us about whether a **particular permit** or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under Article XIII B, section 6."⁷¹ Thus, the particular permit involved in this Test Claim must be examined in order to determine if it is unique to local government and if it imposes additional public service

⁶² *Long Beach Unified School Dist.*, 225 Cal.App.3d at 173.

⁶³ See *Hayes*, 11 Cal.App.4th at 1594.

⁶⁴ *San Diego Unified School Dist.*, 33 Cal.4th at 874.

⁶⁵ *Id.*

⁶⁶ (1998) 64 Cal.App.4th 1190.

⁶⁷ *Id.*

⁶⁸ Water Board's Opposition at 24; Department of Finance's Opposition at 3-4.

⁶⁹ (2007) 150 Cal.App.4th 898, 919,

⁷⁰ This Commission also rejected this precise argument in both the Los Angeles and San Diego MS4 Permit Decisions and should reject it for the same reasons here.

⁷¹ *Id.* at 919 (emphasis added).

burdens on local government.⁷² Indeed, the permit at issue in this Test Claim applies uniquely to local government because its permittees are 66 cities and towns, 4 counties, 3 water conservation districts and 4 flood control districts. The permit does not regulate any private entities. The title of Provision C.2 is "Municipal Operations."

These facts distinguish this case from *Richmond*, where the court held that simply returning local government from an exempt status back to a rule of general application could not be considered a new program that required subvention.⁷³ In *Richmond*, the state repealed legislation that exempted local government safety officers from certain workers' compensation rules.⁷⁴ As a result of that repeal, local government paid the same workers' compensation as any private employer in the state.⁷⁵ The permit in this Test Claim does not apply to all entities in the state – it applies uniquely to local public entities. For example, the requirement to notify the California Department of Fish and Game before undertaking a rural public work⁷⁶ or to implement the Mobile Surface Cleaner Program of the Bay Area Stormwater Management Agencies Association⁷⁷ uniquely apply to local government.

4. The City Has Insufficient Fee Authority to Cover the Increased Costs.

The Water Board argues that the City has fee authority within the meaning of Government Code section 17556(d) to cover the costs of implementing the New Permit.⁷⁸ Section 17556(d) provides in part that where "[t]he local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service," the Commission shall not find costs mandated by the state.⁷⁹ The Water Board claims that the City may charge fees to businesses to cover the cost of inspections. Although the City may be able to recover some expenses in an isolated case, for example, as a development fee when a rural road is constructed, such a fee could be an offset in the parameters and guidelines process. Therefore, there is no a basis to deny the City's claim in its entirety for that reason. And, as stated in the Test Claim, San Jose is unable to raise its fees without voter approval or notice requirements that are subject to protest.⁸⁰

⁷² *County of Los Angeles*, 150 Cal.App.4th at 919. See also San Diego MS4 Permit Decision at 36 (applying *County of Los Angeles v. Comm'n on State Mandates* (2007) 150 Cal.App.4th 898, to find that MS4 permit requirements uniquely burden local government); Los Angeles MS4 Permit Decision at 50 (same).

⁷³ *Id.* at 1197-98.

⁷⁴ *City of Richmond*, 64 Cal.App.4th at 1193-94.

⁷⁵ *Id.* at 1197.

⁷⁶ Provision C.2.e.i.

⁷⁷ Provision C.2.f.i.

⁷⁸ Water Board's Opposition at 24.

⁷⁹ Gov't Code §17556(d).

⁸⁰ Cal. Const. Art. XIII D §§6(c) & 4(e).

5. The Additional Costs of the New Permit Are More Than *De Minimis*.

The Water Board incorrectly argues that because the City complied with Prior Permits, any additional costs associated with implementing the New Permit will be *de minimis*.⁸¹ As stated in the Declaration of Melody Tovar submitted with the City's Test Claim, San Jose "will incur \$184,474.00 in the implementation of the **increased** requirements of Provision C.2.b, c, e; and \$140,000.00 for the implementation of the **increased** requirements in Provision C.2.f."⁸² Thus, the costs claimed by the City are more than *de minimis*.

6. The Commission Is the Proper Forum for This Test Claim.

The Water Board argues that San Jose did not exhaust its administrative remedies because it should have sought an appeal before the state Water Board.⁸³ The Board is incorrect. The two California Water Code sections on which the Board relies pertain to permit enforcement and implementation: Water Code section 13140 provides that "[t]he state board shall formulate and adopt state policy for water quality control,"⁸⁴ and section 13320 states that "an aggrieved person may petition the state board to review [the regional water board's] action or failure to act."⁸⁵ But this Test Claim does not challenge enforcement or environmental necessity of the permit. Rather, the issue is cost reimbursement. Government Code section 17552 specifically provides that a hearing before the Commission is "the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."⁸⁶ Consequently, it is the expertise of the Commission, and not of the state Water Board, that is central in this case. Under Government Code section 17552, this Test Claim is properly before this Commission.

⁸¹ Water Board's Opposition at 24-25.

⁸² City's Test Claim, Declaration of Melody Tovar at ¶ 9(d) (emphasis added).

⁸³ Water Board's Opposition at 25.

⁸⁴ Water Code §13140.

⁸⁵ Water Code §13320(a).

⁸⁶ See also *Central Delta Water Agency v. State Water Resources Control Board* (1993) 17 Cal.App.4th 621, 641 (stating that the Legislature requires all questions concerning state-mandated costs to be presented to the Commission on State Mandates in the first instance).

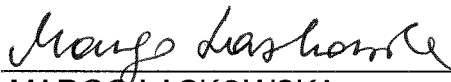
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Conclusion

The City of San Jose respectfully requests the Commission to find that the many new state-mandated activities and higher level of services that the Water Board requires under the New Permit are reimbursable mandates. San Jose's evidence concerning the substantial new costs imposed as a result of their development and implementation is undisputed.

Very truly yours,

RICHARD DOYLE, City Attorney

By: 
MARGO LASKOWSKA
Deputy City Attorney

MKL/mkl

ATTACHMENT A

PRIOR PERMIT COMPARED TO NEW PERMIT:

Provision C.2.b:

<p>SANTA CLARA COUNTY 2001 PERMIT</p>	<p>MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>C.2 Urban Runoff Management Plan and Performance Standards</p> <p>a) The Dischargers shall implement control measures and best management practices to reduce pollutants in stormwater discharges to the maximum extent practicable. The Management Plan shall serve as the framework for identification, assignment, and implementation of such control measures/BMPs. The Management Plan contains Performance Standards that address the following Program elements: Illicit Connection/Illegal Discharge Control; Industrial/Commercial Discharger Control; Public Streets, Roads, and Highways Operation and Maintenance; Storm Drain Operation and Maintenance; Water Utility Operation and Maintenance; and New Development Planning Procedures and Construction Inspection. Performance Standards are defined as the level of implementation necessary to demonstrate the control of pollutants in stormwater to the maximum extent practicable. . . .</p>	<p>C.2.b Sidewalk/Plaza Maintenance and Pavement Washing</p> <p>i. Task Description – The Permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains. The Permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program. The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.</p> <p>ii. Reporting - The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.</p>

Provision C.2.c:

<p align="center">SANTA CLARA COUNTY 2001 PERMIT</p>	<p align="center">MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>C.2 Urban Runoff Management Plan and Performance Standards</p> <p>a) The Dischargers shall implement control measures and best management practices to reduce pollutants in stormwater discharges to the maximum extent practicable. The Management Plan shall serve as the framework for identification, assignment, and implementation of such control measures/BMPs. The Management Plan contains Performance Standards that address the following Program elements: Illicit Connection/Illegal Discharge Control; Industrial/Commercial Discharger Control; Public Streets, Roads, and Highways Operation and Maintenance; Storm Drain Operation and Maintenance; Water Utility Operation and Maintenance; and New Development Planning Procedures and Construction Inspection. Performance Standards are defined as the level of implementation necessary to demonstrate the control of pollutants in stormwater to the maximum extent practicable. . . .</p>	<p>C.2.c Bridge and Structure Maintenance and Graffiti Removal</p> <p>i. Task Description</p> <ol style="list-style-type: none"> 1) The Permittees shall implement appropriate BMPs to prevent polluted stormwater and non-stormwater discharges from bridges and structural maintenance activities directly over water or into storm drains. 2) The Permittees shall implement BMPs for graffiti removal that prevent non-stormwater and wash water discharges into storm drains <p>ii. Implementation Levels</p> <ol style="list-style-type: none"> 1) The Permittees shall prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses. 2) The Permittees shall protect nearby storm drain inlets before removing graffiti from walls, signs, sidewalks or other structures. The Permittees shall prevent any discharge of debris, cleaning compound waste, paint waste or wash water due to

	<p>graffiti removal from entering storm drains or watercourses.</p> <p>3) The Permittees shall determine the proper disposal method for wastes generated from these activities. The Permittees shall train their employees and/or specify in contracts about these proper capture and disposal methods for the wastes generated.</p> <p>iii. Reporting – The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.</p>
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Provision C.2.e:

<p style="text-align: center;">SANTA CLARA COUNTY 2001 PERMIT</p>	<p style="text-align: center;">MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>C.5 Performance Standard for Rural Public Works Maintenance and Support:</p> <p>The Program shall develop by June 2002, Performance Standards, annual training and technical assistance needs, and annual reporting requirements for the following rural public works maintenance support activities: a) management and/or removal of large woody debris and live vegetation from stream channels; b) streambank stabilization projects; c) road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion; and d) environmental permitting for rural public works activities.</p>	<p>C.2.e Rural Public Works Construction and Maintenance</p> <p>i. Task Description – The Permittees shall implement and require contractors to implement BMPs for erosion and sediment control during and after construction for maintenance activities on rural roads, particularly in or adjacent to stream channels or wetlands. The Permittees shall notify the Water Board, the California Department of Fish and Game and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands.</p> <p>ii. Implementation Level</p> <ol style="list-style-type: none"> 1) The Permittees shall develop, where they do not already exist, and implement BMPs for erosion and sediment control measures during construction and maintenance activities on rural roads, including developing and implementing appropriate training and technical assistance resources for rural public works activities, by April 1, 2010. 2) The Permittees shall develop and implement appropriate BMPs for the following activities, which minimize impacts on streams and wetlands in the course of rural

	<p>road and public works maintenance and construction activities:</p> <ul style="list-style-type: none">a) Road design, construction, maintenance, and repairs in rural areas that prevent and control road-related erosion and sediment transport;b) Identification and prioritization of rural road maintenance on the basis of soil erosion potential, slope steepness, and stream habitat resources;c) Construction of roads and culverts that do not impact creek functions. New or replaced culverts shall not create a migratory fish passage barrier, where migratory fish are present, or lead to stream instability;d) Development and implementation of an inspection program to maintain rural roads' structural integrity and prevent impacts on water quality;e) Maintenance of rural roads adjacent to stream and riparian habitat to reduce erosion, replace damaging shotgun culverts and excessive erosion;f) Re-grading of unpaved rural roads to slope outward where consistent with road engineering safety standards, and installation of water bars as appropriate; andg) Replacement of existing culverts or design of new culverts or
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bridge crossings shall use measures to reduce erosion, provide fish passage and maintain natural stream geomorphology in a stable manner.

- 3) The Permittees shall develop or incorporate existing training and guidance on permitting requirements for rural public works activities so as to stress the importance of proper planning and construction to avoid water quality impacts.
- 4) The Permittees shall provide training incorporating these BMPs to rural public works maintenance staff at least twice within this Permit term.

iii. Reporting – The Permittees shall report on the implementation of and compliance with BMPs for the rural public works construction and maintenance activities in their Annual Report, including reporting on increased maintenance in priority areas.

Provision C.2.f:

<p align="center">SANTA CLARA COUNTY 2001 PERMIT</p>	<p align="center">MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>C.2 Urban Runoff Management Plan and Performance Standards</p> <p>a) The Dischargers shall implement control measures and best management practices to reduce pollutants in stormwater discharges to the maximum extent practicable. The Management Plan shall serve as the framework for identification, assignment, and implementation of such control measures/BMPs. The Management Plan contains Performance Standards that address the following Program elements: Illicit Connection/Illegal Discharge Control; Industrial/Commercial Discharger Control; Public Streets, Roads, and Highways Operation and Maintenance; Storm Drain Operation and Maintenance; Water Utility Operation and Maintenance; and New Development Planning Procedures and Construction Inspection. Performance Standards are defined as the level of implementation necessary to demonstrate the control of pollutants in stormwater to the maximum extent practicable. . . .</p>	<p>C.2.f. Corporation Yard BMP Implementation</p> <p>i. Task Description – Corporation Yard Maintenance</p> <p>1) The Permittees shall prepare, implement, and maintain a site specific Stormwater Pollution Prevention Plan (SWPPP) for corporation yards, including municipal vehicle maintenance, heavy equipment and maintenance vehicle parking areas, and material storage facilities to comply with water quality standards. Each SWPPP shall incorporate all applicable BMPs that are described in the California Stormwater Quality Association's Handbook for Municipal Operations and the Caltrans Storm Water Quality Handbook Maintenance Staff Guide, May 2003, and its addenda, as appropriate.</p> <p>2) The requirements in this provision shall apply only to facilities that are not already covered under the State Board's Industrial Stormwater NPDES General Permit.</p> <p>3) The site specific SWPPPs for corporation yards shall be completed by July1, 2010.</p> <p>ii. Implementation Level</p> <p>1) Implement BMPs to minimize</p>

	<p>pollutant discharges in stormwater and prohibit non-stormwater discharges, such as wash waters and street sweeper, vactor, and other related equipment cleaning wash water. Pollution control actions shall include, but not be limited to, good housekeeping practices, material and waste storage control, and vehicle leak and spill control.</p> <p>2) Routinely inspect corporation yards to ensure that no non-stormwater discharges are entering the storm drain system and, during storms, pollutant discharges are prevented to the maximum extent practicable. At a minimum, an inspection shall occur before the start of the rainy season.</p> <p>3) Plumb all vehicle and equipment wash areas to the sanitary sewer after coordination with the local sanitary sewer agency and equip with a pretreatment device (if necessary) in accordance with the requirements of the local sanitary sewer agency.</p> <p>4) Use dry cleanup methods when cleaning debris and spills from corporation yards. If wet cleaning methods must be used (e.g., pressure washing), the Permittee shall ensure that wash water is collected and disposed in the sanitary sewer after coordination with the local sanitary sewer agency. Any private companies hired by the Permittee to perform cleaning activities on Permittee-owned property shall follow the</p>
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	<p>same requirements. In areas where sanitary sewer connection is not available, the Permittees shall collect and haul the wash water to a municipal wastewater treatment plant, or implement appropriate BMPs and dispose of the wastewater to land in a manner that does not adversely impact surface water or groundwater.</p> <p>5) Outdoor storage areas containing waste pollutants shall be covered and/or bermed to prevent discharges of polluted stormwater runoff or run-on to storm drain inlets.</p> <p>iii. Reporting – The Permittees shall report on implementation of SWPPPs, the results of inspections, and any follow-up actions in their Annual Report.</p>
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ATTACHMENT B

FEDERAL REGULATIONS COMPARED TO NEW PERMIT:

Provision C.2.b:

<p>CLEAN WATER ACT §402(p)(3)(B) [33 U.S.C. §1342(p)(3)(B)]</p>	<p>MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>(B) Municipal discharge. Permits for discharges from municipal storm sewers--</p> <p>(i) may be issued on a system- or jurisdiction-wide basis;</p> <p>(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and</p> <p>(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.</p>	<p>C.2.b Sidewalk/Plaza Maintenance and Pavement Washing</p> <p>i) Task Description – The Permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains. The Permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program. The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.</p> <p>ii) Reporting - The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.</p>

Provision C.2.c:

<p>CLEAN WATER ACT §402(p)(3)(B) [33 U.S.C. §1342(p)(3)(B)]</p>	<p>MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>(B) Municipal discharge. Permits for discharges from municipal storm sewers</p> <p>(i) may be issued on a system- or jurisdiction-wide basis;</p> <p>(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and</p> <p>(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.</p>	<p>C.2.c Bridge and Structure Maintenance and Graffiti Removal</p> <p>i) Task Description</p> <p>(1) The Permittees shall implement appropriate BMPs to prevent polluted stormwater and non-stormwater discharges from bridges and structural maintenance activities directly over water or into storm drains.</p> <p>(2) The Permittees shall implement BMPs for graffiti removal that prevents non-stormwater and wash water discharges into storm drains</p> <p>ii) Implementation Levels</p> <p>(1) The Permittees shall prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses.</p>
<p>40 C.F.R. §122.26(d)(2)(iv)(A)(1)</p>	
<p>(d) Application requirements for large and medium municipal separate storm sewer discharges.</p> <p>.....</p> <p>(2) Part 2. Part 2 of the application shall consist of:</p> <p>.....</p> <p>(iv) Proposed management program. . . Such programs shall be based on:</p> <p>(A) A description of structural and source control measures to reduce pollutants from runoff from commercial</p>	<p>(2) The Permittees shall protect nearby storm drain inlets before removing graffiti from walls, signs, sidewalks or other structures. The Permittees shall prevent any discharge of debris, cleaning compound waste, paint waste or wash water due to graffiti removal from entering storm drains or watercourses.</p>

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and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

.....

(3) The Permittees shall determine the proper disposal method for wastes generated from these activities. The Permittees shall train their employees and/or specify in contracts about these proper capture and disposal methods for the wastes generated.

iii. Reporting – The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.

Provision C.2.e:

<p>CLEAN WATER ACT §402(p)(3)(B) [33 U.S.C. 1342(p)(3)(B)]</p>	<p>MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>(B) Municipal discharge. Permits for discharges from municipal storm sewers</p> <p>(i) may be issued on a system- or jurisdiction-wide basis;</p> <p>(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and</p> <p>(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.</p>	<p>C.2.e Rural Public Works Construction and Maintenance</p> <p>i. Task Description – The Permittees shall implement and require contractors to implement BMPs for erosion and sediment control during and after construction for maintenance activities on rural roads, particularly in or adjacent to stream channels or wetlands. The Permittees shall notify the Water Board, the California Department of Fish and Game and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands.</p> <p>ii. Implementation Level</p> <p>5) The Permittees shall develop, where they do not already exist, and implement BMPs for erosion and sediment control measures during construction and maintenance activities on rural roads, including developing and implementing appropriate training and technical assistance resources for rural public works activities, by April 1, 2010.</p> <p>6) The Permittees shall develop and implement appropriate BMPs for the following activities, which minimize impacts on streams and wetlands in the course of rural</p>

	<p>road and public works maintenance and construction activities:</p> <ul style="list-style-type: none">h) Road design, construction, maintenance, and repairs in rural areas that prevent and control road-related erosion and sediment transport;i) Identification and prioritization of rural road maintenance on the basis of soil erosion potential, slope steepness, and stream habitat resources;j) Construction of roads and culverts that do not impact creek functions. New or replaced culverts shall not create a migratory fish passage barrier, where migratory fish are present, or lead to stream instability;k) Development and implementation of an inspection program to maintain rural roads' structural integrity and prevent impacts on water quality;l) Maintenance of rural roads adjacent to stream and riparian habitat to reduce erosion, replace damaging shotgun culverts and excessive erosion;m) Re-grading of unpaved rural roads to slope outward where consistent with road engineering safety standards, and installation of water bars as appropriate; andn) Replacement of existing culverts or design of new culverts or
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	<p>bridge crossings shall use measures to reduce erosion, provide fish passage and maintain natural stream geomorphology in a stable manner.</p> <p>7) The Permittees shall develop or incorporate existing training and guidance on permitting requirements for rural public works activities so as to stress the importance of proper planning and construction to avoid water quality impacts.</p> <p>8) The Permittees shall provide training incorporating these BMPs to rural public works maintenance staff at least twice within this Permit term.</p> <p>iii. Reporting – The Permittees shall report on the implementation of and compliance with BMPs for the rural public works construction and maintenance activities in their Annual Report, including reporting on increased maintenance in priority areas.</p>
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Provision C.2.f:

<p>CLEAN WATER ACT §402(p)(3)(B) [33 U.S.C. §1342(p)(3)(B)]</p>	<p>MUNI. REGIONAL STORMWATER 2009 PERMIT</p>
<p>(B) Municipal discharge. Permits for discharges from municipal storm sewers</p> <p>(i) may be issued on a system- or jurisdiction-wide basis;</p> <p>(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and</p> <p>(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.</p>	<p>C.2.f. Corporation Yard BMP Implementation</p> <p>i. Task Description – Corporation Yard Maintenance</p> <p>1) The Permittees shall prepare, implement, and maintain a site specific Stormwater Pollution Prevention Plan (SWPPP) for corporation yards, including municipal vehicle maintenance, heavy equipment and maintenance vehicle parking areas, and material storage facilities to comply with water quality standards. Each SWPPP shall incorporate all applicable BMPs that are described in the California Stormwater Quality Association's Handbook for Municipal Operations and the Caltrans Storm Water Quality Handbook Maintenance Staff Guide, May 2003, and its addenda, as appropriate.</p> <p>2) The requirements in this provision shall apply only to facilities that are not already covered under the State Board's Industrial Stormwater NPDES General Permit.</p> <p>3) The site specific SWPPPs for corporation yards shall be completed by July1, 2010.</p> <p>ii. Implementation Level</p> <p>1) Implement BMPs to minimize</p>
<p>40 C.F.R. §122.26(d)(2)(iv)(A)(5)</p>	
<p>(d) Application requirements for large and medium municipal separate storm sewer discharges.</p> <p>....</p> <p>(2) Part 2. Part 2 of the application shall consist of:</p> <p>....</p> <p>(iv) Proposed management program. . . Such programs shall be based on:</p> <p>(A) A description of structural and source control measures to reduce pollutants from runoff from commercial</p>	

and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

.....
(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges

pollutant discharges in stormwater and prohibit non-stormwater discharges, such as wash waters and street sweeper, vactor, and other related equipment cleaning wash water. Pollution control actions shall include, but not be limited to, good housekeeping practices, material and waste storage control, and vehicle leak and spill control.

- 2) Routinely inspect corporation yards to ensure that no non-stormwater discharges are entering the storm drain system and, during storms, pollutant discharges are prevented to the maximum extent practicable. At a minimum, an inspection shall occur before the start of the rainy season.
- 3) Plumb all vehicle and equipment wash areas to the sanitary sewer after coordination with the local sanitary sewer agency and equip with a pretreatment device (if necessary) in accordance with the requirements of the local sanitary sewer agency.
- 4) Use dry cleanup methods when cleaning debris and spills from corporation yards. If wet cleaning methods must be used (e.g., pressure washing), the Permittee shall ensure that wash water is collected and disposed in the sanitary sewer after coordination with the local sanitary sewer agency. Any private companies hired by the Permittee to perform cleaning activities on Permittee-owned property shall follow the

	<p>same requirements. In areas where sanitary sewer connection is not available, the Permittees shall collect and haul the wash water to a municipal wastewater treatment plant, or implement appropriate BMPs and dispose of the wastewater to land in a manner that does not adversely impact surface water or groundwater.</p> <p>5) Outdoor storage areas containing waste pollutants shall be covered and/or bermed to prevent discharges of polluted stormwater runoff or run-on to storm drain inlets.</p> <p>iii. Reporting – The Permittees shall report on implementation of SWPPPs, the results of inspections, and any follow-up actions in their Annual Report.</p>
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PROOF OF SERVICE

I, Margo Laskowska, declare that I am over 18 years of age and not a party to the within action. I am employed with the Office of the City Attorney, City of San Jose, at 200 E. Santa Clara Street, San Jose, California 95113. On September 16, 2011, the following document(s) were transmitted as follows:

CITY OF SAN JOSE'S REPLY RE: TEST CLAIM FOR UNFUNDED MANDATES RELATING TO CALIFORNIA WATER QUALITY CONTROL BOARD, SAN FRANCISCO REGION, PERMIT NO. CAS612008, ISSUES AS ORDER NO. R2-2009-0074 (OCTOBER 14, 2009)

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	BY ELECTRONIC MAIL: I uploaded a true copy thereof to the CSM Drop Box at the Commission on State Mandates' website to be posted and the Commission on State Mandates to transmit notice via electronic mail to all parties and interested parties on its mailing list in accordance with the Commission on State Mandates' Procedures For Electronic Filing of Documents [Cal. Code Regs., tit. 2. § 1181.2, subd. (c)(1)].
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

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

EXECUTED on the 16th day of September, 2011, in San Jose, California.


Margo Laskowska

Commission on State Mandates

Original List Date: 12/10/2010
Last Updated: 9/19/2011
List Print Date: 09/20/2011
Claim Number: 10-TC-05
Issue: Municipal Regional Stormwater Permit - Municipal Operations (C.2)

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Dennis Speciale State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)324-0254 Email DSpeciale@sco.ca.gov Fax:
Mr. Michael Lauffer State Water Resources Control Board 1001 I Street, 22nd Floor Sacramento, CA 95814-2828	Tel: (916)341-5183 Email mlauffer@waterboards.ca.gov Fax: (916)641-5199
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COMMISSION ON STATE MANDATES

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**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 20, 2011, I served the:

Claimant Rebuttal Comments

Municipal Regional Stormwater Permit –Municipal Operations (C.2)

Municipal Regional Stormwater Permit Number CAS612008, issued by the Regional Water Quality Control Board, San Francisco Region as Order No. R2-2009-0074, October 14, 2009
City of San Jose, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 20, 2011 at Sacramento, California.



Heidi J. Palchik