Received
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WRITER'S DIRECT NUMBER
(213) 629-8788

WRITER'S E-MAIL ADDRESS
dburhenn@burhenngest.com

June 30, 2011

Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Joint Test Claim of San Bernardino County Local Agencies Concerning California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

To the Commission:

This firm represents the San Bernardino County Flood Control District, the County of San Bernardino and the Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Highland, Montclair, Ontario and Rancho Cucamonga (collectively, "Claimants") with respect to the enclosed Joint Test Claim concerning California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 ("Order"). The Claimants are permittees under the Order and have filed a Joint Test Claim because the state mandates that are the subject of this Test Claim apply nearly identically to all of the Claimants.

Enclosed are the Test Claim Forms of the Claimants (Sections 1-4), a Narrative Statement (Section 5), supporting Declarations (Section 6) and Documentation (Section 7). The Documentation includes a copy of the Order as well as the previous 2002 order that it superseded, as well as other relevant documents.

Thank you for your consideration of this matter. As noted in the Test Claim Forms, communications regarding this Test Claim should be directed to my attention.

Very truly yours,

David W. Burhenn

cc: Claimants

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

San Bernardino County Flood Control District
Name of Local Agency or School District

Gregory C. Devereaux
Claimant Contact

Chief Executive Officer
Title

385 North Arrowhead Ave., Fifth Floor
Street Address

San Bernardino, CA 92415-0120
City, State, Zip

909-387-5417
Telephone Number

909-387-5430
Fax Number

gdevereaux@cao.sbcounty.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave. Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-688-7716
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #: 10-TC-10

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections, statutes, bill numbers, regulations, and/or executive orders that impose the alleged mandate (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]). When alleging regulations or executive orders, please include the effective date of each one.

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, effective January 29, 2010

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

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8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Gregory C. Devereaux
Print or Type Name of Authorized Local Agency or School District Official

Chief Executive Officer
Print or Type Title

Signature of Authorized Local Agency or School District Official

June 27, 2011
Date

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California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

County of San Bernardino
Name of Local Agency or School District

Gregory C. Devereaux
Claimant Contact

Chief Executive Officer
Title

385 North Arrowhead Ave., Fifth Floor
Street Address

San Bernardino, CA 92415-0120
City, State, Zip

909-387-5417
Telephone Number

909-387-5430
Fax Number

gdevereaux@cao.sbcounty.gov
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Print or Type Name of Authorized Local Agency or School District Official

Chief Executive Officer
Print or Type Title

Signature of Authorized Local Agency or School District Official

June 27, 2011
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Big Bear Lake
Name of Local Agency or School District

David Lawrence
Claimant Contact

Director of Public Works/City Engineer
Title

39707 Big Bear Blvd. (physical); PO Box 6133 (mail)
Street Address

Big Bear Lake, CA 92315
City, State, Zip

909-866-5831
Telephone Number

909-866-7511
Fax Number

dlawrence@citybigbearlake.com
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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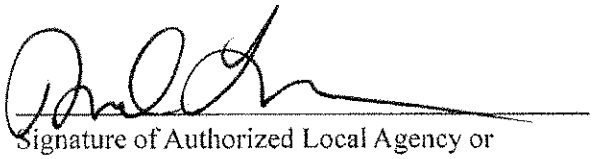
David Lawrence
Print or Type Name of Authorized Local Agency or School District Official

Director of Public Works/City Engineer
Print or Type Title


Signature of Authorized Local Agency or School District Official

June 23, 2011
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Chino
Name of Local Agency or School District

Patrick J. Glover
Claimant Contact

City Manager
Title

13220 Central Avenue
Street Address

Chino, CA 91710
City, State, Zip

909-591-9806
Telephone Number

909-591-6829
Fax Number

pglover@cityofchino.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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Claimant Representative Name

Attorney
Title

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Organization

624 South Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-688-7716
Fax Number

dburhenn@burhenngest.com
E-Mail Address

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Test Claim #:

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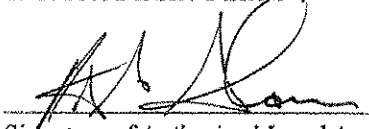
Patrick J. Glover
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title



Signature of Authorized Local Agency or School District Official

June 27, 2011
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Chino Hills
Name of Local Agency or School District

Michael Fleager
Claimant Contact

City Manager
Title

14000 City Center Drive
Street Address

Chino Hills, CA 91709
City, State, Zip

909-364-2600
Telephone Number

909-364-2695
Fax Number

mfleager@chinohills.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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Claimant Representative Name

Attorney
Title

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Organization

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Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-688-7716
Fax Number

dburhenn@burhenngest.com
E-Mail Address

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Michael Fleager
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Michael S. Fleager
Signature of Authorized Local Agency or School District Official

June __, 2011
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Colton
Name of Local Agency or School District

Amer Jakher
Claimant Contact

Public Works & Utility Services Director
Title

650 N. La Cadena Drive
Street Address

Colton, Ca 92324
City, State, Zip

(909) 370-5065
Telephone Number

(909) 370-5072
Fax Number

Ajakher@ci.colton.ca.us
E-Mail Address

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Attorney
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Los Angeles, CA 90017
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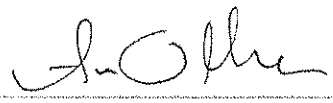
Amer Jakher
Print or Type Name of Authorized Local Agency or School District Official

Public Works and Utility Services Director
Print or Type Title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June 29, 2011
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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Fontana
Name of Local Agency or School District

Kenneth R. Hunt
Claimant Contact

City Manager
Title

8353 Sierra Avenue
Street Address

Fontana, CA 92335
City, State, Zip

909-350-7653
Telephone Number

909-350-6613
Fax Number

khunt@fontana.org
E-Mail Address

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Kenneth R. Hunt
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

June 27, 2011
Date

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1. TEST CLAIM TITLE

CA Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Highland
Name of Local Agency or School District

Joseph A. Hughes
Claimant Contact

City Manager
Title

27215 Base Line
Street Address

Highland, CA 92346
City, State, Zip

909-864-6861
Telephone Number

909-862-3180
Fax Number

jhughes@cityofhighland.org
E-Mail Address

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Joseph A. Hughes
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

June 27, 2011
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Montclair
Name of Local Agency or School District

Michael C. Hudson
Claimant Contact

City Engineer
Title

5111 Benito Street
Street Address

Montclair, CA 91763
City, State, Zip

909-625-9441
Telephone Number

909-621-1584
Fax Number

mhudson@cityofmontclair.org
E-Mail Address

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Michael C. Hudson
Print or Type Name of Authorized Local Agency or School District Official

City Engineer
Print or Type Title

Signature of Authorized Local Agency or School District Official

June 28, 2011
Date

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California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

For CSM Use Only
Filing Date:
Test Claim #: 10-TC-10

2. CLAIMANT INFORMATION

City of Ontario
Name of Local Agency or School District

Chris Hughes
Claimant Contact

City Manager
Title

393 E. B Street
Street Address

Ontario, CA
City, State, Zip

909-395-2555
Telephone Number

Fax Number

chughes@ci.ontario.ci.us
E-Mail Address

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Claimant Representative Name

Attorney
Title

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Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-688-7716
Fax Number

dburhenn@burhenngest.com
E-Mail Address

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections, statutes, bill numbers, regulations, and/or executive orders that impose the alleged mandate (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]). When alleging regulations or executive orders, please include the effective date of each one.

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, effective January 29, 2010

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

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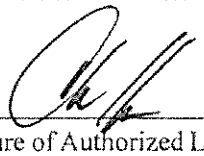
8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Chris Hughes
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title



Signature of Authorized Local Agency or School District Official

6/24/11
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

2. CLAIMANT INFORMATION

City of Rancho Cucamonga
Name of Local Agency or School District

Jack Lam
Claimant Contact

City Manager
Title

10500 Civic Center Drive
Street Address

Rancho Cucamonga, CA 91730
City, State, Zip

909-477-2700
Telephone Number

909-477-2846
Fax Number

jack.lam@cityofrc.us
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 South Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
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213-629-8788
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E-Mail Address

For CSM Use Only

Filing Date:

Test Claim #: 10-TC-10

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections, statutes, bill numbers, regulations, and/or executive orders that impose the alleged mandate (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]). When alleging regulations or executive orders, please include the effective date of each one.

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, effective January 29, 2010

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

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8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Jack Lam
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Jack Lam
Signature of Authorized Local Agency or School District Official

June 27, 2011
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

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SECTION FIVE

NARRATIVE STATEMENT

In Support of Joint Test Claims of San Bernardino County Local Agencies Concerning Santa Ana RWQCB Order No. R8-2010-0036 (NPDES No. CAS 618036)

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NARRATIVE STATEMENT IN SUPPORT OF JOINT TEST CLAIMS

I. INTRODUCTION

On January 29, 2010, the California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), adopted a new storm water permit, Order No. R8-2010-0036 (NPDES No. CAS 618036) ("the 2010 Permit") regulating discharges from the municipal separate storm sewer systems ("MS4s") operated by a number of municipal entities in portions of San Bernardino County.[1]

The 2010 Permit includes numerous new requirements that exceed the requirements of federal law and were not included in the previous MS4 permit issued by the RWQCB, Order No. R8-2002-0012 ("the 2002 Permit").[2] These new requirements represent unfunded State mandates for which the 2010 Permit permittees, including the claimants herein, the San Bernardino County Flood Control District ("District"), the County of San Bernardino ("County"), and the Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Highland, Montclair, Ontario and Rancho Cucamonga (collectively, "Claimants") are entitled to reimbursement under article XIII B section 6 of the California Constitution.

This Section 5 of the Test Claim identifies the activities that are unfunded mandates and sets forth the basis for reimbursement for such activities. The mandates for which the claimants seek a subvention of state funds are described in detail below, but generally encompass the following:

A. A requirement to develop and update Local Implementation Plans, primarily set forth in Section III of the 2010 Permit, as well as other sections;

B. A requirement to evaluate discharges to determine if they are a significant source of pollutants, contained in Section V;

C. Requirements relating to the incorporation of Total Maximum Daily Loads ("TMDLs") or proposed TMDLs into the 2010 Permit set forth in Section V, and in the monitoring and reporting program associated with the Permit;

D. A requirement, if necessary, to promulgate and implement ordinances to address pathogen or bacterial indicator sources such as animal wastes, contained in Section VII;

---

[1] A copy of the 2010 Permit and Fact Sheet are included as Exhibit A in Section 7, filed herewith. The permittees regulated under the 2010 Permit are the San Bernardino County Flood Control District, San Bernardino County and the Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Rancho Cucamonga, Redlands, Rialto, San Bernardino, Upland and Yucaipa.

[2] A copy of the 2002 Permit is included as Exhibit B in Section 7.

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E. Requirements relating to the development and implementation of a program to enhance existing Illicit Connections/Illegal Discharges programs, contained in Section VIII, and in the monitoring and reporting program associated with the 2010 Permit;

F. A requirement for permittees to create and maintain a database of septic systems in their jurisdictions and to adopt a program to ensure that failure rates are minimized, contained in Section IX;

G. A requirement for new inspection programs, including requirements to establish and evaluate inspections of residential areas and development of best management practices ("BMPs") for common areas, development BMPs and BMP fact sheets relating to several categories of business, the identification and development BMPs for mobile businesses and enhanced construction site inspections, contained in Section X;

H. Requirements to, among other things, develop new standard designs and BMPs, a Watershed Action Plan, review planning documents to incorporate watershed protection principles, submit revised Water Quality Management Plans ("WQMPs"), develop new procedures, incorporate Low Impact Development ("LID") and hydromodification requirements to public agency projects, develop criteria for alternatives and in-lieu funding, create databases and inspect public projects, contained in Section XI, and in the monitoring and reporting program associated with the 2010 Permit;

I. Requirements to review and assess the permittees' public education and outreach efforts and to revise them, contained in Section XII;

J. Requirements for the permittees to inventory and inspect on an annual basis their facilities, operations and drainage facilities, to evaluate the inspection and cleanout frequency of drainage facilities and to annually evaluate information provided to field staff, contained in Section XIII;

K. Requirements to update the permittees' existing training program to incorporate the requirements of the 2010 Permit, including a training schedule, curriculum content and defined expertise for staff, with documentation of such training, and specific requirements for the Principal Permittee to provide training, contained in Section XVI;

L. A requirement to notify the Regional Board of facilities operating without a proper permit, contained in Section XVII; and

M. Requirements for an assessment of program effectiveness on an area-wide as well as a jurisdiction-specific basis, contained in Section XVIII.

II. BACKGROUND

This Test Claim concerns the choice made by the RWQCB, acting under its authority granted by California law, to impose requirements under the 2010 Permit that go beyond those required by the federal Clean Water Act ("CWA"). The RWQCB has such authority because, under the CWA, a regional board may impose additional requirements on a permittee covered by

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a federal National Pollutant Discharge Elimination System ("NPDES") permit, such as the 2010 Permit. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 619. As the California Supreme Court stated in *City of Burbank,*

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not *"less stringent"* than the federal standard (33 U.S.C. § 1370, italics added)."

35 Cal.4th at 627-28. The source of those additional requirements is the Porter-Cologne Water Quality Act, Water Code § 13000 *et seq.*, which was adopted *prior* to the CWA and whose scope is in fact broader than the CWA's. (For example, the Porter-Cologne Act covers all "waters of the State," which are defined to include groundwater. Water Code § 13050(e). The CWA's jurisdiction is more narrowly defined as navigable waters of the United States, and does not include groundwater. *Rice v. Harken Exploration Co.* (5th Cir. 2001) 250 F.3d 264, 269.)

This Commission previously has found, in two test claims brought regarding MS4 permits issued by the Los Angeles RWQCB and the San Diego RWQCB, that those regional boards had issued permit requirements that exceeded the requirements of federal law and regulation and represented unfunded state mandates. *In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-192*, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 ("Los Angeles County Test Claim"); *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, Case No. 07-TC-09 ("San Diego County Test Claim").

In particular, the Commission in the San Diego County Test Claim has held that even though an NPDES permit is issued under general federal authority under the CWA, where the regional board has required "specific actions, i.e., required acts that go beyond the requirements of federal law," the "state has freely chosen to impose those requirements." In such a case, the permit provision "is not a federal mandate." San Diego County Test Claim at 44-45 (citations omitted).

III. FEDERAL LAW

The 2010 Permit was issued, in part, under the authority of the CWA, 33 U.S.C. § 1251 *et seq.* The CWA was amended in 1987 to include within its regulation of discharges from "point sources" to "waters of the United States" discharges to such waters from MS4s. 33 U.S.C. § 1342(p)(2). The CWA requires that MS4 permits:

(i) may be issued on a system or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(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.

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33 U.S.C. § 1342(p)(3)(B).

The interpretation of subsection (iii) was addressed by the United States Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999). In that case, the Ninth Circuit held that MS4 permits were *not* required to meet strict water quality standards, as is the case with industrial NPDES permits. However, the Court ruled, EPA or the state had the "discretion" to require "such other provisions" as they would determine appropriate for pollutant control. 191 F.3d at 1166. The Court did not, however, rule that this discretionary power was *required* by the CWA, but rather that the provision "gives the EPA [or the State] *discretion* to determine what pollution controls are appropriate." *Id.* (emphasis supplied). Moreover, the plain language of the statute indicates that even the "such other provisions" language is subject to the "maximum extent practicable" ("MEP") limitation in Section 1342. *Browner* did not address whether the discretionary "other provisions" was subject to the MEP standard, as the issue was not before the court. *See also Natural Resources Defense Council, Inc. v. U.S. EPA,* 966 F.2d 1292, 1308 (9th Cir. 1992) (MEP standard applicable to MS4 NPDES permits).

The 2010 Permit itself recites in a finding that, "[c]onsistent with the CWA, it is the Regional Board's intent that this Order require the implementation of best management practices (BMPs) to reduce, *consistent with the MEP standard*, the discharge of pollutants in urban storm water from the MS4s in order to support attainment of water quality standards." 2010 Permit, Finding B.3 (emphasis supplied; footnote omitted). However, under *City of Burbank,* a RWQCB can include provisions in an NPDES permit that exceed the MEP standard under the CWA. 35 Cal.4th at 627-28. Moreover, as noted above, the Porter-Cologne Act, under whose authority the 2010 Permit also was issued, provides a RWQCB with the ability to require provisions that are entirely unrelated to the requirements of the CWA.

The 2010 Permit is an example of a "Phase I" permit, those issued to MS4s serving larger urban populations, as is the case with the San Bernardino County local agencies. In 1990, EPA issued regulations to implement Phase I of the MS4 permit program. 55 Fed. Reg. 47990 (November 16, 1990). The requirements of those regulations, as they apply to the provisions of the 2010 Permit relevant to this Test Claim, will be discussed in further depth below. The federal stormwater regulations are included in Exhibit I to Section 7 of the Test Claim.

In addition to the MS4 permit, the State Water Resources Control Board ("State Board") has issued two state-wide general NPDES stormwater permits covering construction sites (SWRCB Order 2009-0009 DWQ, as amended by Order 2010-0014 DWQ) and certain industrial facilities (SWRCB Order 97-03 DWQ). The responsibility to enforce these permits has been delegated by the State Board to the regional boards. *See* Order 2009-0009 DWQ, paragraph 6; Order 97-03 DWQ, paragraph 13 (Exhibit C to Section 7). In addition, permittees covered by the general construction and general industrial stormwater permits are required to pay fees to the State Board, which are authorized under Water Code § 13260(d)(2)(B)(i)-(iii). As will be discussed below, however, the 2010 Permit requires the permittees to inspect sites and facilities and to conduct enforcement activities with respect to these general permits, which represents a transfer of a state obligation to local agencies. The Commission itself has already found, in the

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Los Angeles County Test Claim, that such obligations represent state mandates. Los Angeles County Test Claim at 40-48.

IV. CALIFORNIA LAW

The CWA allows delegation of its NPDES permit powers to the states. 33 U.S.C. § 1342(b). Pursuant to that delegation, in 1972, California became the first state authorized to issue NPDES permits through an amendment of the existing Porter-Cologne Water Quality Act. California Water Code § 13370. Thus, California voluntarily undertook to issue NPDES permits under the rubric of its state laws. The Porter-Cologne Act, adopted in 1969, pre-dated the CWA delegation by three years.

The Porter-Cologne Act's scope is broader than that of the CWA, as it applies not only to navigable surface waters (the scope of permits issued under the NPDES program) but to any "waters of the state," including "any surface water or groundwater, including saline waters, within the boundaries of the state." Water Code § 13050(e). The 2010 Permit, in addition to being issued as an NPDES permit under the authority of the CWA, also was issued by the RWQCB as a "waste discharge requirement," pursuant to the authority of Article 4, Chapter 4, Division 7 of the California Water Code, commencing with California Water Code § 13260. *See also* California Water Code § 13263; 2010 Permit at 9. Thus, the 2010 Permit may, and does, contain programs authorized under both the federal CWA and the state Porter-Cologne Act.

As discussed above, the California Supreme Court, in *City of Burbank,* has expressly held that a regional board has the authority to issue a permit that exceeds the requirements of the CWA and its accompanying federal regulations. The State Board, which supervises all regional boards in the state, including the RWQCB, has acknowledged that since NPDES permits are adopted as waste discharge requirements, they can more broadly protect "waters of the State" rather than be limited to "waters of the United States," which do not include groundwater. *In re Building Industry Assn. of San Diego County and Western States Petroleum Assn.,* State Board Order WQ 2001-15 (Exhibit C to Section 7).

V. STATE MANDATE LAW

Article XIII B, section 6 of the California Constitution requires that the Legislature provide a subvention of funds to reimburse local agencies any time that the Legislature or a state agency "mandates a new program or higher level of service on any local government." The purpose of section 6 "is to preclude the State from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." *County of San Diego v. State of California* (1991) 15 Cal.4th 68, 81.

The Legislature implemented section 6 by enacting a comprehensive administrative scheme to establish and pay mandate claims. Govt. Code § 17500 *et seq.*; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333 (statute establishes "procedure by which to implement and enforce section 6").

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"Costs mandated by the state" include "any increased costs which a local agency ... is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Govt. Code § 17514. Orders issued by any regional board pursuant to the Porter-Cologne Act come within the definition of "executive order." *County of Los Angeles v. Comm'n on State Mandates* (2007) 150 Cal.App.4th 898, 920.

Govt. Code § 17556 identifies seven exceptions to reimbursement requirement for state mandated costs. The exceptions are as follows:

> (a) The claim is submitted by a local agency . . . that requested legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. . . .
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .
>
> (d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies or . . . includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election.
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

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In addition, the program or increased level of service must impose "unique requirements on local government" that "carry out a state policy". (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *see also County of Los Angeles, supra,* 150 Cal.App.4th at 907.)

None of these exceptions would bar reimbursement for the state mandates identified in this Test Claim. First, the exceptions identified in Govt. Code §§ 17556(a), (b), (e), (f) and (g) are not relevant to this Test Claim, and will not be discussed further. The exceptions identified in Govt. Code § 17556(c), relating to federal mandates, or (d), relating to fee assessments, are expected to be raised in potential opposition to the Test Claim and will be discussed further below. Also, as will be demonstrated below, the requirements of the mandates in this Test Claim represent "unique requirements on local government" and not requirements that fall equally upon local governments and private parties, so as to obviate the need for a subvention of state funds under article XIII B, section 6.

In particular, when a new program or level of service is in part federally required, California courts have held that where the state-mandated activities exceed federal requirements, those mandates constitute a reimbursable state mandate. *Long Beach Unified School Dist. v State of California* (1990) 225 Cal.App.3d 155, 172-73. Moreover, a "new program or higher level of service" imposed by the State upon a local agency as a result of a federal law or federal program is not necessarily a "federal mandate." In order to be a federal mandate, the obligation must be imposed upon the local agency by federal law itself. The test for determining whether the "new program or higher level of service" is a state mandate is whether the state has a "true choice" in the matter of implementation, *i.e.*, whether the state freely chose to impose that program on local municipalities as opposed to performing the obligation itself. *Hayes v. Comm'n on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94.

The 2010 Permit imposes requirements establishing new programs and/or a higher level of service on the permittees thereunder, including Claimants, and that are unique to the permittees' function as local government entities. The requirements are unique to government entities because they arise from the operation of a MS4 NPDES Permit, which is a permit issued only to municipalities and which requires activities that are not required of any private, non-governmental discharger. These requirements include the adoption of ordinances, the development and amendment of government planning documents and electronic databases, the inspection of facilities, the enforcement of statutes and ordinances and other activities. The requirements set forth in the Test Claim relate to Claimants' unique role as local governmental agencies. For those reasons, the provisions of the 2010 Permit set forth in this Test Claim are state mandates for which Claimants, and the permittees under the 2010 Permit, are entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution.

The Commission already has determined that provisions in MS4 permits issued to municipal agencies by the Los Angeles and San Diego RWQCBs represent unfunded state mandates for which a subvention of funds is required. In making that determination, the Commission focused on whether the provisions required in the MS4 permits were supported either by the language of the CWA or by provisions in the CWA stormwater permit regulations,

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found at 40 CFR § 122.26. To illustrate that the provisions set forth below are not required by federal law or regulation, the Claimants have included a separate section with respect to each provision of the 2010 Permit discussing that issue.

VI. STATE MANDATED ACTIVITIES

A. Local Implementation Plan Requirement

Section III and other sections of the 2010 Permit requires the permittees, including Claimants, to undertake two significant and new tasks not required by federal law or regulation. The first is the creation of an areawide "model" "Local Implementation Plan" ("LIP"), to be used to develop detailed documentation for each permittee's individual program element of the Municipal Storm Water Management Plan ("MSWMP"), departments and personnel responsible for its implementation, standard operating procedures and plans and tools and resources needed for its implementation. The second task is the development of individual, permittee-specific LIP documents (based on the "model" LIP) that describe in detail individual permittee compliance programs. The LIP is a comprehensive document, documenting each permittee's efforts to comply with each provision of the 2010 Permit. It must, moreover, be regularly updated to reflect changes in the details of each permittee's compliance programs. The LIP is a requirement of the RWQCB and is not required by the CWA or by the federal CWA regulations. The LIP requirement was not part of the 2002 Permit.

The Sections listed below relate to specific LIP requirements found throughout the 2010 Permit. The majority of those requirements are found in Section III, but LIP requirements are also found in Sections VII, relating to legal authority and enforcement, VIII, relating to the illicit connection/illegal discharge program, IX, relating to sewage spills, X, relating to inspections, XI, relating to new development, XIII, relating to permittee facilities and XVI, relating to training. Each of these provisions is set forth in Paragraph (A)(1) below. Additional LIP requirements are set forth in Section V.D of the Permit, noted in Paragraph VI.C, below, and in additional Sections included in the Test Claim.

1. Applicable Requirements in the 2010 Permit[3]

SECTION III

A.1.o. Within 6 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, shall develop and submit an area-wide model Local Implementation Plan (LIP) to the Executive Officer of the Regional Board. The submitted model LIP shall be deemed acceptable to the Regional Board if the Executive Officer raises no written objections within 30 days of submittal. The model LIP should describe each program element per the MSWMP; the departments and personnel responsible for its implementation; applicable standard operating procedures, plans, policies, checklists, and drainage area maps; and tools and resources needed for its implementation. The model LIP should also establish internal and external

[3] Where footnotes in the 2010 Permit test are germane to the Test Claim, they are included in this font. Footnotes that are not part of the 2010 Permit text are included in this font. Non-relevant footnotes have been omitted. Additionally, the original footnote numbers in the 2010 Permit have not been used.

reporting and notification requirements to ensure accountability and consistency. The model LIP should also describe the mechanisms, procedures, and/or programs whereby the Permittees' individual LIPs will be coordinated through the WAP.

A.2.a. Within 18 months of adoption of this Order, the Principal Permittee shall develop and implement a Principal Permittee-specific LIP, based on the areawide model LIP. A copy of the LIP, signed by the Chair of the Board of Directors for the Principal Permittee, shall be submitted to the Executive Officer within 18 months of the adoption of this Order.

A.2.h. [The Principal Permittee shall] Track, monitor, and keep training records of all personnel involved in the implementation of the Principal Permittee's LIP.

A.2.i. [The Principal Permittee shall] Solicit and coordinate public input for any proposed major changes to its LIP, the MSWMP, and/or Model WQMP, as appropriate.

B.1. Within 18 months of adoption of this Order, each Co-Permittee shall develop and implement an LIP for its jurisdiction. The LIP shall describe the Co-Permittee's legal authority, its ordinances, policies and standard operating procedures; identify departments and personnel for each task and needed tools and resources. The LIP shall establish internal departmental coordination and reporting requirements to ensure accountability and consistency. Within 18 months from the adoption of this Order, each Co-Permittee shall adopt a Permittee-specific LIP, based on the areawide model LIP. The LIP shall have the written approval of the Permittee's City Manager or County Supervisor prior to its implementation and shall be updated on an as needed basis. Each Permittee's approved LIP shall be submitted, in electronic format, to the Executive Officer within 18 months of adoption of this Order.

B.3.g. [Each permittee shall] Track, monitor, and keep training records of all personnel involved in the implementation of its LIP.

SECTION VII

F. [relevant portion] The Permittees shall specify, in the LIP, the mechanisms or procedures to control the contribution of pollutants into their MS4s prior to accepting connections from owners of other MS4 systems outside the Permittees' jurisdiction.

H. Each Permittee shall include in its LIP the legal authorities and mechanisms used to implement the various program elements required by this Order to properly manage, reduce and mitigate potential pollutant sources within its jurisdiction. The LIP shall include citations of appropriate local ordinances, identification of departmental jurisdictions and key personnel in the implementation and enforcement of these ordinances. The LIP shall include procedures, tools and timeframes for progressive enforcement actions and procedures for tracking compliance.

SECTION VIII

C. The LIP shall identify the staff positions responsible for different components of the IDDE program.

SECTION IX

D. The interagency or interdepartmental sewer spill response coordination and responsibility within each Permittee's jurisdiction shall be described in the LIP.

SECTION X

A.8 [relevant portion] [relating to requirements for reporting of permit non-compliance, see Paragraph VI.L below] The Permittees shall include in their LIP the method for verification of permit coverage and for notification of non-filers to the Regional Board.

E.3 Each Permittee shall document its residential program in its LIP.

SECTION XI

H.

Within 18 months of adoption of this Order, each Permittee shall develop and implement standard procedures and tools, and include in its LIP the following:

1. A WQMP review checklist that incorporates the required elements of the WQMP and a clear process for consultation early in the planning process with the Permittee's appropriate departments and sections. This review process shall involve the Permittee's Planning and Engineering Department during the preliminary and final WQMP review to adequately incorporate project-specific water quality measures and watershed protection principles in their CEQA analysis.

2. Tool or procedures to incorporate project conditions of approval, including proper funding and maintenance and operation of all structural BMPs. The parties responsible for the long-term maintenance and operation of the BMPs upon project close-out and a funding mechanism for operation and maintenance shall be identified prior to approval of the WQMP.

3. A procedure to ensure that appropriate easements and ownership are recorded/included in appropriate documents that provides the Permittee the authority for post-construction BMP operation and maintenance (also see J.1, below).

4. A final project close-out procedure and checklist to ensure that post-construction BMPs (site design, structural source control and treatment control BMPs) have been built as per the approved WQMPs or other conditions of approval and are fully functional prior to issuance of certificates of occupancy (also see I.1 and I.2, below).

5. A procedure to work cooperatively with the local vector control district to address any vector problems associated with the water quality control systems. If not properly designed and maintained, some of the BMPs implemented to treat urban runoff could create a habitat for vectors (e.g., mosquitoes and rodents) and become a nuisance. The WQMP review, approval, and closure processes shall include consultation and collaboration with the local vector control districts on BMP design, installation, and operation and maintenance to

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prevent or minimize vector issues. If vector or nuisance problems are identified during inspections, the local vector control district should be notified.

6. Staff involved with SWMP review and approval shall be trained in accordance with Section XVI, Training Requirements.

SECTION XIII

F. [relevant portions] [relating to requirement to implement control measures to minimize infiltration of seepage from sanitary sewers to storm drain system and requirement to cooperate and coordinate with sewage collection agency to respond to sewage spills]This control measure and coordination with the sewering agency shall be documented in the LIP.

J. [relating to permittee facilities] Each Permittee shall include its procedures, schedules, and tools necessary to implement the requirements of this section in its LIP. The LIP shall state the positions responsible for performing and reporting completion of each task and the training requirements for that position.

SECTION XIV

D. [relevant portions] A database of post-construction BMPs for which the Permittees are responsible for shall be developed and referenced in the LIP.

SECTION XVI

I. The LIP shall specify the training requirements for Permittee staff and contractor involved in implementing the requirements of this Order. Each Permittee shall maintain a written record of all training provided to its storm water and related program staff.

2. Requirements of Federal Law

No federal statute, regulation, or policy requires the preparation of the LIP. The LIP was included in the 2010 Permit as an initiative of RWQCB staff. Neither the Permit findings nor the Fact Sheet prepared by RWQCB staff to explain the basis for the 2010 Permit requirements cite to the CWA or its regulations as authority for the LIP, but indicate that it was add at Regional Board staff's initiative regarding a perceived "lack of a written procedure on how to implement various elements of the MSWMP" (Finding C.4, 2010 Permit at 11) and to "promote transparency and consistency within the permitted area" (Fact Sheet at 26).

The CWA regulations, in 40 CFR § 122.26(d)(2)(iv), require the setting forth of a management program to address discharges from the MS4 system. This requirement was satisfied with the completion of the MSWMP under the 2002 Permit. The regulations do not, however, 1) require the preparation of or implementation of a LIP document or 2) require program documentation in the level of detail as required by the LIP provisions in the 2010 Permit. Hence, Section IV of the 2010 Permit is not a federal mandate but rather represents a state initiative requiring a new program and/or a high level of service.

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Moreover, a new program or higher level of service imposed by the State upon a municipality as a result of a federal law or regulation is not necessarily a "federal mandate." In order to be a federal mandate, the obligation must be imposed upon the municipality by federal law itself. The test for determining whether the "new program or higher level of service" is a state mandate is whether the state has a "true choice" in the manner of implementation, *i.e.*, whether the state freely chose to impose that program on local municipalities as opposed to performing the obligation itself. *Hayes, supra,* 11 Cal.App.4th at 1593-94. In the case of the LIP requirements, the RWQCB freely chose to impose that requirement on the permittees, including Claimants.

It should be noted that the Commission, in deciding the San Diego County Test Claim, found that requirements for permittee collaboration (which are part of the LIP requirements set forth above) represented an unfunded state mandate. San Diego County Test Claim at 95-97.

3. Requirements of 2002 Permit

The 2002 Permit contains no requirements relating to the LIP; neither for the development of the LIP template, nor for the development of individual (permittee-specific) LIPs, nor the updating of the LIP over the course of the permit. Hence, the LIP requirements of the 2010 Permit establish a new program and/or higher level of service.

4. Mandated Activities

Develop a model LIP: The 2010 Permit require the Principal Permittee, a Claimant, in conjunction with the permittees, including other Claimants, first to develop a model LIP. In compliance with the 2010 Permit, the District has developed the model LIP on behalf of the permittees. The Model LIP development is funded by the permittees pursuant to their joint Implementation Agreement. To date, preparation of the model LIP template has involved the hiring of a consultant to prepare the LIP template, revising the document to address RWQCB comments and coordinating meetings among the District, the Permittees and RWQCB staff.

Develop individual LIPs: The permittees including the Claimants will develop their individual LIPs, based on the framework of the approved model LIP. The individual LIPs must describe permittees legal authority, ordinances, polices, standard operating procedures, identified departments and personnel, departmental coordination and reporting requirements, documentation of a residential program, development and documentation of a post-construction BMP database, cooperation with sewage agencies and documentation of training requirements. The preparation of the LIP will require permittees, including Claimants, to undertake tasks such as setting forth and identifying personnel classifications, ordinances, plans and policies, the procedures for carrying out inspections and for incorporating programs required by the permit into the regulation of existing and new development, the identifying of public facilities in addition to the MS4 system, and the describing of procedures to promote accountability.

Update LIPs: Section III.B.1 of the 2010 Permit, as well as other sections, require that each permittee's LIP be updated as needed as required to reflect changes to compliance programs

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being implemented by the permittees, including Claimants. Such requirements thus continue beyond development of the initial LIP and represent a continuing mandate.

5. Actual and Estimated Increased Costs

To comply with the LIP requirements set forth in the 2010 Permit, the permittees, including Claimants, will be required to spend monies both to develop the required model LIP and to develop individual LIPs in compliance with the 2010 Permit. Moreover, as required by the 2010 Permit, each permittee's LIP will be required to be updated as needed, resulting in additional costs for the permittees.

The development of the model LIP is being conducted by the District as Principal Permittee, using funding provided by the permittees, including Claimants, through the Implementation Agreement among the permittees. In addition to their contribution toward the development of the LIP template, each permittee, including Claimants, is required to individually fund the development and implementation of its own LIP, as well as any required updates.

Claimants' costs and estimated future costs for their compliance with these provisions exceeded $1,000 in Fiscal Years ("FY") 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Claimant Declarations included in Section 6.

B. Requirement to Evaluate Authorized Non-Stormwater Discharges To Determine If They Are Significant Sources of Pollutants to the MS4

Section V.A.16 of the 2010 Permit requires the permittees, including Claimants, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4 to determine whether such discharges are a significant source of pollutants to the MS4. Such a requirement is not found in the federal stormwater regulations and is a state mandate.

1. Applicable Requirement in 2010 Permit

SECTION V

A.16. The Permittees must evaluate the authorized discharges listed above to determine if any are a significant source of pollutants to the MS4, and notify the Executive Officer if any are a significant source of pollutants to the MS4. If the Permittee determines that any are a source of pollutants that exceed water quality standards, the Permittee(s) shall either:

a. Prohibit the discharge from entering the MS4; or

b. Authorize the discharge category and ensure that "Source Control BMPs" and Treatment Control are implemented to reduce or eliminate pollutants resulting from the discharge; or

c. Require or obtain coverage under a separate Regional Board or State Board permit for discharge into the MS4.

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2. Requirements of Federal Law

The CWA requires MS4 NPDES permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." 33 U.S.C. § 1342(p)(3)(B)(ii). The federal CWA regulations, in 40 CFR § 122.26(d)(2)(iv)(B)(1), do not require a municipality to address certain specified categories of non-stormwater discharges (including those categories set forth in Section V.A.1-15) into the MS4 unless the municipality determines that such discharges are sources of pollutants to "waters of the United States." The CWA regulations do not, however, require a municipality *to affirmatively evaluate* those discharges to determine if they are such a source of pollutants, as required by Section V.A.16 of the 2010 Permit. And, the CWA regulations refer to the discharges as sources of pollutants to "waters of the United States," not to MS4 systems, which may or may not ultimately discharge to waters of the United States. Because this permit requirement goes beyond the requirements set forth in the federal CWA regulations, it is a state mandate requiring a new program and/or higher level of service.

3. Requirements of 2002 Permit

The 2002 Permit contained no requirement for the permittees to evaluate the list of authorized non-stormwater discharges for their potential to be significance source of pollutants to the MS4.

4. Mandated Activities

Section V.A.16 of the 2010 Permit requires the permittees, including Claimants, to specifically evaluate 15 different water streams to determine their status as significant sources of pollutants to the MS4. Such evaluation would include monitoring, analysis of samples, evaluation of the monitored waters as sources of pollutants, potential followup investigation, reporting to the Executive Officer and, then, take one of the three required steps set forth in the 2010 Permit, prohibit the discharge from entering the MS4, authorize it but require source control BMPs or treatment controls or require the source to obtain coverage under a separate permit.

5. Actual and Estimated Increased Costs

The effort to monitor and assess the categories of discharges is being jointly undertaken by the permittees, including Claimants, pursuant to the Implementation Agreement. The cost of these efforts has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and is expected to exceed $1,000 in succeeding fiscal years. *See* Declarations in Section 6.

C. Incorporation of TMDLs

Section V.D of the 2010 Permit contains several requirements regarding Water Quality Based Effluent Limitations ("WQBELs") and other steps to implement TMDLs either previously adopted by the RWQCB or proposed for later adoption. TMDLs are required to be established, for each waterbody that is listed, pursuant to 33 U.S.C. § 1313(d), as "impaired" for a pollutant or pollutants that exceed applicable water quality standards. The TMDLs establish "wasteload allocations" ("WLAs") for point sources of the pollutants at issue and "load allocations" for non-

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point sources, with such allocations together (along with a margin of safety) are designed to achieve the water quality standard. *See* 40 CFR § 130.2(i) (definition of "TMDL").

In the area covered by the Permit, the RWQCB established TMDLs for bacterial indicators in the Middle Santa Ana River ("MSAR") Watershed and for nutrients during dry hydrological conditions for Big Bear Lake ("BBL"). In addition, the RWQCB is developing a TMDL for mercury in Big Bear Lake which has not yet been promulgated. WLAs have been established for both the MSAR and BBL TMDLs. The BBL TMDL permittees (County, District and City of Big Bear Lake) are in compliance with the urban WLA for Phosphorus for that TMDL (Finding F.15, 2010 Permit at 26).

While the plain language of Section V.D should be interpreted, in light of the understanding of the permittees, including Claimants, to provide that such implementation would be accomplished in accordance with the CWA's requirement that discharges from the MS4 be controlled to the MEP, 33 U.S.C. § 1342(p)(2)(B)(iii) (*see also* 2010 Permit Finding B.3), in letters received by permittees from the RWQCB staff (Section 7, Exhibit F), staff has taken the position that such implementation is to be accomplished without reference to the MEP standard. In effect, the RWQCB letter demands various management program measures that exceed CWA requirements as they pertain to MS4s. If the RWQCB persists in this approach, it will be making the free choice to require actions by Claimants that exceed the MEP standard and thus impose, by discretion, a state mandate.

Moreover, the RWQCB has essentially incorporated the entire implementation plan for that BBL TMDL, an implementation plan (Exhibit D to Section 7) which includes non-permittee entities and which goes far beyond the requirements of the CWA stormwater regulations. The permittees made clear during the course of discussions of the 2010 Permit that such requirements were not mandated by federal authority. Despite these facts, the RWQCB imposed such requirements, which force the permittees to implement a regulatory scheme that exceeds the federal mandate.

1. Applicable Requirements in 2010 Permit

The applicable requirements are set forth in Section V.D of the 2010 Permit, beginning on page 51 and ending on page 58, and including Sections V.D.2 through V.D.6, with some exceptions. Due to length, these provisions are attached as Attachment 1 to this Narrative Statement.

2. Requirements of Federal Law

The 2010 Permit Fact Sheet states that, pursuant to 40 CFR § 122.44(d)(vii)(B), "NPDES permits be consistent with the applicable wasteload allocations in the TMDLs." (Fact Sheet at 15.) This regulation provides that an NPDES permit must ensure that WQBELs "developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." If this regulation applies to NPDES MS4 permits (*see* discussion next below), it requires WQBELs that

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are consistent with the applicable WLA. The regulation does not authorize the state to incorporate requirements intended to implement TMDLs, including modeling, non-MS4 monitoring or addressing non-MS4 related discharges, into an NPDES permit. If such requirements are imposed in a MS4 permit, as they are in Section V.D, they represent state-imposed a new program or higher level service.

Additionally, 40 CFR § 122.44(d)(vii)(B) arguably is not applicable to MS4 NPDES permits. The plain language and regulatory history of this regulation indicates that it was not intended to apply to MS4 permits. Please see the analysis provided in Exhibit E to Section 7, January 28, 2011 Letter to Lisa Jackson and Peter Silva from the American Public Works Association, the National Association of Clean Water Agencies and the National Association of Flood & Stormwater Management Agencies ("1/28/11 Letter), at 6-7.

That analysis shows that 40 CFR § 122.44(d)(vii)(B) and the other provisions that were added to 40 CFR § 122.44(d) in 1989 were intended to clarify and strengthen existing requirements for water quality-based permitting "where necessary to achieve state water quality standards." *See* August 21, 1989 Memorandum from James R. Elder, Director of Water Enforcement, to Water Management Division Directors, Regions I-X, entitled "New Regulations Governing Water Quality-Based Permitting in the NPDES Permitting Program," quoted in the 1/28/11 Letter. Since NPDES MS4 permittees are *not* required to achieve water quality standards (*Browner, supra*), the requirements of Section 122.44(d)(vii)(B) are inapplicable.

Even if 40 § CFR 122.44(d)(vii)(B) is applicable to MS4 permits, implementation of TMDL WLAs still is subject to the MEP standard, the overarching compliance standard for MS4 permits (including, expressly, the 2010 Permit), as discussed in Paragraph III above. Implementation of the WLAs also is subject to jurisdictional limitations set forth in the 2010 Permit itself. In either case, consistent with the plain language of 33 U.S.C. § 1342(p)(3)(B) and *Browner,* EPA or the state can, as a discretionary matter, require MS4 discharges to comply with WLAs based on water quality standards. However, such requirements are subject to the MEP standard. If the RWQCB imposes WLAs in a manner not reflecting MEP, such as strict numeric effluent limits, such an imposition represents a choice by the RWQCB to ignore MEP requirements. Such a freely exercised choice, however, represents a state mandate. *Hayes, supra.*

a. MSAR TMDL Requirements: In the course of implementing the MSAR TMDL WLAs in the 2010 Permit, the RWQCB is ignoring MEP requirements. First, a key requirement in the implementation of the final WQBELs for the MSAR bacterial indicator TMDL under dry weather conditions, is the preparation and implementation of a Comprehensive Bacteria Reduction Plan ("CBRP"), describing the specific actions that have been taken or will be taken to achieve compliance with the urban WLAs under dry weather conditions. If approved by the RWQCB, the CBRP will be incorporated into the 2010 Permit as the final WQBELs for indicator bacteria in dry weather, with updates required based on an analysis of BMP effectiveness. 2010 Permit, Section V.D.2.b(ii)-(iii).

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Intrinsic to the use and implementation of the CBRP is the concept that it, like all programs intended to meet water quality standards in the Permit, is subject to the MEP requirement. *See* 2010 Permit Finding B.3. However, in a recent letter from the RWQCB concerning a draft CBRP submitted by the permittees, including Claimants, the Executive Officer stated that provisions in the draft indicating that it was designed to achieve compliance and mitigation of urban sources of bacteria sources to the MEP were "extraneous and inconsistent with the clear permit terms." Letter from Kurt V. Berchtold, RWQCB Executive Officer, to Granville Bowman, County of San Bernardino, March 30, 2011, at 2 (Exhibit F to Section 7). The letter demanded that references to MEP be deleted from the CBRP. *Id.*

The RWQCB's position that the MEP standard does not apply to the CBRP, the document intended to serve as the final WQBELs for indicator bacteria, indicates the agency's apparent choice to go beyond MEP and to exercise its discretion to require strict compliance with numeric MSAR bacterial indicator WLAs. The permittees are continuing to work with RWQCB staff on this issue, but believe that if the RWQCB insists on requiring a CBRP that exceeds the MEP standard, such a requirement is an unfunded state mandate, as it would involve the exercise of discretion by the RWQCB to require the permittees to strictly meet water quality standards. (Additionally, the inclusion of MSAR dry weather bacterial indicator WLA numeric effluent limits in Section V.D.2.c and the wet weather WLA numeric effluent limits in Section V.D.3 (which assumes that the 2010 Permit still is in effect as of January 1, 2026) also represent the affirmative choice of the RWQCB, and is not a federal requirement.)

As set forth in *Browner,* the CWA does *not* require municipalities to attain numeric water quality standards, including numeric effluent limits, with respect to MS4 discharges. 191 F.3d at 1166. Instead, municipal permittees are allowed to attain those standards through the installation of BMPs, an approach consistent with the MEP standard. This is the approach ostensibly set forth in Section V.D.2 with respect to the MSAR TMDL. However, if the RWQCB is ignoring MEP, and making it impossible for the permittees, including Claimants, to develop a CBRP that achieves the WLAs through BMPs, the RWQCB would in essence be imposing the WLAs as numeric effluent limits. Such an approach would represent the RWQCB's clear choice to impose requirements on the permittees that are *not* required under federal law. *See also Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, in which the Court of Appeal found:

> With respect to municipal storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable."

124 Cal. App.4th at 874.

The specific questions of whether the CWA requires WLAs to be incorporated into stormwater permits as numeric effluent limitations recently was addressed by the Oregon Court of Appeals in *Tualatin Riverkeepers, et al. v. Oregon Dept. of Environ. Quality,* 235 Ore. App. 132 (2010). In that case, an environmental group had challenged stormwater permits that did not include numeric waste load allocations like those set forth in the TMDLs. *Tualatin,* 235 Ore.

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App. at 147. The Oregon Court of Appeals rejected that challenge, holding that the CWA does not require WLAs to be included in NPDES permits as numeric effluent limits. *Id.* at 148.

The RWQCB's position is troubling, because it is counter to state law and the 2010 Permit, which does not require MS4 permittees to strictly attain numeric effluent limits. *See* 2010 Permit Fact Sheet at 6: "As discussed in prior State Water Resources Control Board decisions, this Order does not require strict compliance with water quality standards." The Fact Sheet in turn cited State Board Order WQ 2001-0015, which provided, in relevant part:

> **[O]ur language . . . does not require strict compliance with water quality standards.** Our language requires that storm water management plans be designed to achieve compliance with water quality standards. **Compliance is to be achieved over time, through an iterative approach** requiring improved BMPs.

Order WQ 2001-0015 at 5 (emphasis supplied). *See also Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, in which the court held, in the case of an industrial (not municipal) discharger, that federal regulations did not require that WQBELs be numeric in all circumstances. 109 Cal.App.4th at 1104.

Thus, if the RWQCB imposes the MSAR WLAs as numeric effluent limits, as is authorized by the 2010 Permit, such an imposition is a mandate of the state, imposing a new program or higher level of service on municipalities required to comply with those WLAs.

b. Implementation of BBL TMDL: With respect to the BBL TMDL, the 2010 Permit includes numerous provisions that require actions by the BBL TMDL permittees (Claimants County, District and City of Big Bear Lake) that exceed the requirements of 40 CFR § 122.44(d)(1)(vii)(B), discussed above, and also limitations set forth in the 2010 Permit with respect to sources and jurisdictions beyond the control of the permittees. Those provisions require the BBL TMDL permittees to undertake actions beyond the requirement to comply with the urban WLA for nutrients established in the BBL TMDL, which is being met by the BBL TMDL permittees.

As noted above, the CWA regulations provide, in 40 CFR § 122.44(d)(1)(vii)(B), that an NPDES permit must, in relevant part, ensure that WQBELs "developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." The 2010 Permit Fact Sheet expresses this requirement more simply, that "NPDES permits be consistent with the applicable [WLAs] in the TMDL." Fact Sheet at 15. Thus, the only *federal* requirement with respect to TMDLs in NPDES MS4 permits is the incorporation and maintenance of the WLAs themselves.

If a regional board includes other requirements relating to TMDL implementation, requirements which may be unrelated to discharges from the MS4 into waters of the United States, it does so as a matter of its own discretion, not in response to the requirements of federal law. In the case of the BBL TMDL, the RWQCB has expressly indicated that "[r]equirements of the TMDL implementation plan tasks are incorporated into this Order." 2010 Permit, Finding

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F.7, page 23. Such incorporation is a discretionary act by the RWQCB, and not in response to the CWA or federal stormwater regulations, with respect to the following provisions of the 2010 Permit:

Sections V.D.4.a-b: These provisions require the BBL TMDL permittees to assure continued compliance with the urban WLA for phosphorus and to implement BMPs in the watershed so as not to exceed the WLA. Since the permittees already are in compliance with the WLA, to the extent that the 2010 Permit requires additional BMPs to meet the WLA, such requirement is a higher level of service (as well as not legally required).

Section V.D.4.c-d: These provisions require the BBL TMDL permittees to implement an In-Lake Nutrient Monitoring Plan and the Watershed-wide Nutrient Monitoring Plan. In fact, these plans are not necessary to ensure or support the requirement for the BBL TMDL permittees to comply with the urban WLA, and represent the discretionary action of the RWQCB to require tasks unrelated to the implementation of the WLA. Additionally, plans are unrelated to discharges from the MS4, which is the subject matter of the 2010 Permit and, with respect to the in-lake monitoring plan, relates to a lake over which the BBL TMDL permittees have no jurisdiction. With respect to the watershed monitoring plan, monitoring is similarly required in areas beyond the jurisdictions of the permittees and unrelated to MS4 discharges, as well as for pollutants other than Phosphorus, the sole pollutant for which the urban WLA was established. The requirements are therefore a new program and/or higher level of service.

Section V.D.4.e: This requires the BBL TMDL permittees to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants. This requirement is unrelated to the maintenance of the WLA or discharges from the MS4. Moreover, requirements related to the presence of vegetation in BBL represent a TMDL "target," not a water quality objective which can be incorporated into the MS4 permit. This fact was confirmed by RWQCB staff itself in their response to comments during the development of the BBL TMDL. *See* Exhibit G to Section 7, excerpts of RWQCB staff responses to comments, at 7-8. Thus, this requirement is a new program and/or higher level of service imposed by the state.

Section V.D.4.f: This provision requires submission of a plan for updating the existing BBL watershed nutrient model and in-lake nutrient model. Again, this requirement is unrelated to the maintenance of the urban WLA for phosphorus or discharges from the MS4, which is the sole subject matter of the 2010 Permit. This provision represents the discretionary choice of the RWQCB to shift responsibility for updating modeling requirements from the RWQCB itself to the permittees. It is not required by the federal stormwater regulations, and represents a new program and/or higher level of service.

Section V.D.4.g: This provision requires submission of a plan for in-lake sediment nutrient reduction. Again, this requirement is unrelated to the maintenance of the urban WLA for phosphorus or discharges from the MS4. Moreover, it addresses a non-point source, sediment, not a pollutant associated with MS4 discharges. The permittees are not required to address non-point sources. *See* 2010 Permit, Section I.B ("This Order regulates the *discharges of pollutants* . . . in Urban Runoff from anthropogenic (generated from non-agricultural human

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activities) sources *from MS4s* that are either under the jurisdiction of the Permittees, and/or where the Permittees have MS4 maintenance responsibility, or have authority to approve modifications of the MS4.")(emphasis supplied). Additionally, the lake bottom is the responsibility of the Big Bear Municipal Water District, which is a special district established under state law. As set forth in the Permit, the RWQCB recognizes that the MS4 permittees "should not be held responsible for such facilities and/or discharges," which include discharges from "special districts." Permit, Section I.B.

Section V.D.4.h: This provision requires the plans submitted pursuant to Sections V.D. 4.e-g (collectively termed the "Lake Management Plan") to meet requirements relating to lake capacity, biological resources and recreational opportunities, the development of biocriteria for the lake, identifying defensible methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and dissolved and particulate nutrient inputs and integrating the beneficial use map developed by the RWQCB's Section 401 certification for the BBL nutrient/sediment remediation project. Again, none of these requirements is related to the maintenance of the urban WLA for phosphorus or discharges from the MS4. The MS4 dischargers are not, for example, legally responsible for determining "recreational opportunities" for the lake, or for developing sediment management strategies. Like the other requirements in Section V.D.4, this requirement is a new program and/or higher level of service imposed by the state.

Sections V.D.4.i-j: These provisions require implementation of the Lake Management Plan and submission of an annual report regarding the monitoring programs and the Lake Management Plan, as well as an evaluation of compliance with the WLA using new modeling. Please see comments with respect to Sections V.D.4.c-g above and Section V.D.4.k below.

Section V.D.4.k: This provision requires the BBL TMDL permittees to submit a final "watershed model" to determine WLA compliance. This provision shifts the state's responsibility to justify the scientific basis for the WLAs, as well as requires "watershed" modeling in areas beyond the permittees' jurisdiction. This shift of responsibility on the permittees exceeds what is required by federal law and regulations. In addition, Section V.B.1.b. of 2010 Permit Attachment 5, Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R8-2010-0036 ("MRP"), contains additional requirements for the BBL TMDL permittees with regard to the watershed modeling plan requirements. These requirements are set forth on pages 9 and 10 of the MRP, contained in Section 7 of this Test Claim.

Section V.D.4.l: This provision requires the permittees to revise the MSWMP, the WQMP and the LIP[4] as necessary to implement the plans submitted pursuant to Sections V.D.4.c-g. Please see comments on those sections, above.

Section V.D.4.m: This provision requires that if monitoring data or modeling analyses indicate that the urban WLAs for phosphorus is being exceeded during dry weather conditions despite implementation of the Lake Management Plan and the MSWMP and other Permit

[4] As discussed in Paragraph VI.A, the Claimants believe that the LIP requirement itself represents an unfunded state mandate.

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requirements, the BBL TMDL permittees must evaluate and characterize discharges from significant outfall locations upstream of monitoring locations where exceedances are occurring and to submit a report to the RWQCB Executive Officer discussing BMPs that are being implement and any additional BMPs needed to reduce controllable sources of phosphorus. This requirement imposes a new program and/or higher level of service to the extent that it requires the permittees to address discharges from entities over which they do not have jurisdiction. *See* Section I.B of the 2010 Permit, which states that the Permit regulates "the discharge of pollutants . . . from MS4s that are either under the jurisdiction of the Permittees, and/or where Permittees have MS4 maintenance responsibility, or have authority to approve modifications of the MS4s. That jurisdiction does not extend to such discharges from other MS4s not under the permittees' control.

Section V.D.4.n: This provision requires the permittees to revise their LIP to incorporate the results of nutrient monitoring, evaluation of the effectiveness of control measures to meet the phosphorus WLA, any additional control measures proposed to be implemented if the WLA or "numeric targets" are exceeded and a progress report evaluating progress toward meeting the WLA. The BBL TMDL permittees are in compliance with the WLA. Moreover, a requirement for additional control measures to meet "numeric targets" exceeds the requirements of the CWA and the stormwater regulations, as the targets are not water quality objectives, as discussed above.

c. Knickerbocker Creek Pathogen Investigation: Sections V.D.5.a-b require that Claimant City of Big Bear Lake continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek, unless it can be demonstrated that pathogen sources are from uncontrollable sources. Monitoring already conducted by the city has established this fact, and no further work is required. This determination has been presented to the RWQCB.

The requirements in Section V.D.5 are unrelated to any TMDL currently under development, though Knickerbocker Creek is on the list of impaired waterbodies. These requirements are not required by the CWA or federal stormwater regulations, and represent a discretionary choice by the RWQCB to include them. While the monitoring and reporting program was previously underway, it had not been required in any pervious MS4 permit, and thus represents a new requirement.

d. Big Bear Lake Mercury TMDL: Section V.D.6 requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL Mercury TMDL. Such requirements are not, however, required by federal law or regulation and were imposed as a matter of free choice by the RWQCB.

The BBL Mercury TMDL has not yet been adopted by the RWQCB and is not effective. There is, however, no requirement in the CWA or the stormwater regulations that requires an MS4 permittee to develop "monitoring programs and control measures" in anticipation of the adoption of a TMDL. Moreover, as set forth in comments made by the permittees during development of the TMDL, and as determined through the RWQCB's own data and analysis, there is no known anthropogenic source of Mercury in the urban runoff from the permittees'

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jurisdictions. The 2010 Permit expressly states that it does not require the permittees to control such non-anthropogenic sources. 2010 Permit, Section I.B. The requirement in Section V.D.6 of the 2010 permit is thus a new program which is not authorized by federal law and is a state mandate.

3. Requirements of 2002 Permit

None of the provisions implementing the TMDL WLAs was in the 2002 Permit.

4. Mandated Activities

a. *Requirements for MSAR TMDL Permittees:* Pursuant to Section V.D.2, the MSAR permittee group, the County and the Cities of Chino, Chino Hills, Fontana, Montclair, Ontario, Rancho Cucamonga, Rialto and Upland are required to:

-- Achieve final dry weather WQBELs for bacterial indicators no later than December 31, 2015, with enforcement to commence on January 1, 2016;

-- Develop final WQBELs through the development and implementation of the CBRP, which must include ordinances, BMPs, inspection criteria, treatment facilities, documentation, schedules, metrics, modification of the MSWMP, WQMP and LIPs consistent with the CBRP and description of additional BMPs planned in the event that data from monitoring indicate that water quality indicators for indicator bacteria were still being exceeded after full implementation of the CBRP;

-- Submit the CBRP to the RWQCB for approval;

-- Incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather indicator bacteria, with updating of the CBRP, if necessary, based on BMP effectiveness analysis.

-- If the 2010 Permit is still in effect on December 31, 2025, and the RWQCB has not adopted alternative final WQBELS for wet weather conditions by the date, the urban WLAs for wet weather become the final numeric WQBELs on January 1, 2026.

b. *Requirements for BBL TMDL Permittees:* The requirements related to the BBL nutrient TMDL are set forth in Paragraph VI.C.2.b. above.

c. *Requirements for City of Big Bear Lake:* The requirements related to the City are set forth in Paragraphs VI.C.2.c-d, above.

5. Actual and Estimated Increased Costs

The requirements of Section V.D of the 2010 Permit represent significant actual and estimated increased costs. First, the requirement to go beyond the MEP standard expressed by the Executive Officer's March 30, 2011 letter concerning preparation and implementation of the CBRP for the MSAR TMDL represents additional and increased costs not authorized or required by the CWA. Second, the requirements applicable to the BBL TMDL go far beyond the

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incorporation of the urban WLA for phosphorus, which is the sole requirement imposed on the MS4 permittees. Third, the requirement imposed on the City of Big Bear Lake to undertake monitoring and assessment of control measures relating to Knickerbocker Creek and to participate in the development and implementation of monitoring programs and control measures regarding mercury in Big Bear Lake, prior to the adoption of the BBL mercury TMDL or of any TMDL for Knickerbocker Creek, is a requirement that is not authorized by the CWA or the stormwater regulations, and is therefore a new program or higher level of service mandated by the RWQCB.

The costs of these TMDL-related provisions are shared among all permittees under the Implementation Agreement. Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations in Section 6.

D. Promulgation and Implementation of Ordinances to Address Bacteria Sources

Section VII.D of the 2010 Permit requires the permittees, including Claimants, to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if such sources are present within their jurisdictions. This requirement is not mandated by federal law.

1. Applicable Requirements in 2010 Permit

SECTION VII

D. Within three (3) years of adoption of this Order, the Permittees shall implement fully adopted ordinances that would specify control measures for known pathogen or bacterial sources such as animal wastes if those types of sources are present within their jurisdiction.

2. Requirements of Federal Law

The federal CWA regulations require, in 40 CFR § 122.26(d)(2), that MS4 permitttees demonstrate that they have adequate legal authority "established by statute, ordinances or series of contracts" to address the contribution of pollution to the MS4 associated with industrial activity, prohibit illicit discharges to the MS4, control spills, dumping or disposal of materials other than stormwater to the MS4, control the contribution of pollutants from one portion of the MS4 to another portion, require compliance with conditions in ordinances, permits, contracts or orders, and carry out all inspection, surveillance and monitoring procedures required to determine compliance and non-compliance with permit conditions. 40 CFR § 122.26(d)(2)(i).

None of these requirements addresses the need to adopt an ordinance addressed at a specific pollutant. The requirement in Section VII.D of the 2010 Permit goes beyond the requirements of the regulations and represents the "free choice" by the RWQCB to impose this requirement. As such, it is a state, and not a federal mandate. *Hayes, supra,* 11 Cal.App.4th at 1593-94.

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3. Requirements of 2002 Permit

The 2002 Permit contained no requirements to adopt ordinances such as the requirement contained in Section VII.D of the 2010 Permit.

4. Mandated Activities

Section VII.D of the 2010 Permit requires the permittees, including Claimants, to research existing ordinance authority and, if insufficient to address the source of known pathogens or bacterial sources, to develop ordinance language that meets legal requirements, to submit such language to the permittee governing bodies for consideration and approval of the ordinance/ordinances and to develop a program to implement the ordinances and to enforce the ordinances.

5. Actual and Estimated Increased Costs

Given that animals, either domesticated or wild, are located within each of the jurisdictions subject to the 2010 permit, permittees, including Claimants, will be required to adopt ordinances to address the pollutant sources identified in Section VII.D of the 2010 permit. As this task has been coordinated with the preparation of the CBRP, which is awaiting RWQCB approval, the bulk of costs have not yet been expended. At least one Claimant has spent in excess of $1,000 in FY 2010-11. It is anticipated that costs for Claimants will exceed $1,000 in future FYs under the 2010 Permit. *See* Claimant Declarations in Section 6.

E. Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements

The 2010 Permit (as well as the associated monitoring and reporting program contained in Attachment 5 of the Permit) requires the permittees, including Claimants, to develop a "pro-active" illicit connections/illicit discharges ("IC/ID") or Illicit Discharge Detection and Elimination ("IDDE") program using an EPA manual or equivalent program. The IDDE program then must be used to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring and tracking of discharges to their sources, as well as be linked to urban watershed protection efforts, including maps, photographs, inspections data analysis, watershed education, pollution prevention, stream restoration and assessment of stream corridors. All of these requirements are new from the 2002 Permit and none is required by the CWA or federal CWA regulations.

1. Applicable Requirements in 2010 Permit

SECTION VIII

A. [relevant portion] The Permittees shall develop a pro-active IC/ID or illicit discharge detection and elimination program (IDDE) using the Guidance Manual for Illicit Discharge, Detection, and Elimination by the Center for Watershed Protection or any other equivalent program. [footnote omitted]

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B. The Permittees' IDDE program shall specify a procedure to conduct focused, systematic field investigations, outfall reconnaissance survey, indicator monitoring, and tracking of discharges to their sources. The IDDE program(s) shall be linked to urban watershed protection efforts including: a) the use of GIS maps of the Permittees' conveyance systems to track sources; b) aerial photography to detect IC/IDs; b) municipal inspection programs of construction, industrial, commercial, storm drain systems, municipal facilities, etc.; c) analysis of watershed monitoring and other indicator data; d) watershed education to educate the public about illegal discharges; e)pollution prevention for generating sites; f) stream restoration efforts/opportunities; and g) rapid assessment of stream corridors to identify dry weather flows and illegal dumping. [footnote omitted]

Attachment 5, Monitoring and Reporting Program

Section IV.B.3

a. The Permittees shall review and update their dry weather and wet weather reconnaissance strategies to identify and eliminate illegal discharges and illicit connections using the Guidance Manual for Illicit Discharge, Detection, and Elimination developed by the Center for Watershed Protection or any other equivalent program. The Permittees should identify appropriate monitoring locations, such as geographic areas with a high density of industries associated with gross pollution (e.g. electroplating industries, auto dismantlers) and/or locations subject to maximum sediment loss (e.g. hillside new developments). [footnote omitted]

b. The dry weather monitoring for nitrogen and total dissolved solids shall be included as part of an illegal discharge/illicit connection monitoring program. In light of the recently adopted Nitrogen-TDS objectives for certain management zones, the Permittees shall, within 18 months of Permit adoption, submit a plan to determine baseline concentrations of these constituents in dry weather runoff, if any, from significant outfall locations (36 inches or larger in diameter).

2. Requirements of Federal Law

The CWA prohibits the discharge of "non-stormwater" into the MS4 system. The CWA regulations require that MS4 operators develop and implement a program to detect and remove illicit discharges and improper disposal into storm sewers. 40 CFR § 122.26(d)(iv)(B). However, nowhere in the CWA or the regulations is there any requirement to develop and implement a "pro-active" IDDE program, as required in the above-cited provisions of the 2010 Permit. The Fact Sheet to the 2010 Permit indicates that the requirement to add a "proactive" IDDE program was the choice of the RWQCB to enhance the IC/ID program after determining that the previous program had been "primarily complaint driven or an incidental component of municipal inspections or conveyance inspections." Fact Sheet at 30.

As noted above, an NPDES permit can contain both federal and non-federal requirements. *City of Burbank, supra,* 35 Cal.4th at 618, 628. Where state-mandated activities

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exceed federal requirements, those mandates constitute a reimbursable state mandate. *Long Beach Unified School District, supra,* 225 Cal.App.3d at 172-73.

Moreover, as noted above, a "new program or higher level of service" imposed by the State upon a municipality as a result of a federal law or federal program is not necessarily a "federal mandate." The test for determining whether the "new program or higher level of service" is a state mandate is whether the state has freely chosen to impose that program on local municipalities as opposed to performing the obligation itself. *Hayes, supra,* 11 Cal.App.4th at 1593-94.

Here, the RWQCB freely chose to impose the additional IDDE requirement on the existing IC/ID program maintained by the permittees. That additional requirement thus represents a new program or higher level of service mandated by the state.

3. Requirements of 2002 Permit

While the 2002 Permit contained (in Section VI) an IC/ID program requirement, the RWQCB did not require the IDDE requirements set forth in this Test Claim.

4. Mandated Activities

The requirement to revise existing permittee IC/ID programs to incorporate the IDDE program requires the permittees (including Claimants) to, using the EPA Guidance manual referenced in the 2010 permit or other guidance:

> Specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges; and
>
> Link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping; review and update reconnaissance strategies; identify appropriate monitoring locations related to gross pollution and/or sediment loss; conduct dry weather monitoring for nitrogen and total dissolved solids as part of the IC/ID program and submit a plan to determine the baseline concentrations of these constituents in dry weather runoff.

5. Actual and Estimated Increased Costs

To comply with the IDDE requirements set forth in the 2010 Permit, the permittees, including Claimants, are required to spend funds both to develop the required IDDE and IC/ID monitoring programs and to revise their existing individual IC/ID programs to implement the identified requirements of the 2010 Permit. Moreover, the permittees, including Claimants herein, are required to spend additional funds compiling information and reporting on these activities as required by the 2010 Permit.

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The development of the IDDE program is being conducted by both the District as Principal Permittee using funding provided by the permittees, including the Claimants, through the Implementation Agreement, and by the individual permittees, including Claimants. The District is developing an MS4 database with inputs from the permittees into that database. Additionally, the District, using funding provided through the Implementation Agreement, and individual permittees are conducting monitoring to support the program.

Claimants' costs and estimated future costs to fund this mandate will exceed $1,000 during FY 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations in Section 6.

F. Creation of Septic System Inventory and Requirement To Establish Failure Reduction Program

Pursuant to Section IX.F of the 2010 Permit, permittees with septic systems in their jurisdictions must both inventory such systems and establish a program to ensure that failure rates are minimized pending adoption of septic system regulations.

1. Applicable Requirements in 2010 Permit

SECTION IX

F. Within 2 years of adoption of this Order, Permittees with septic systems in their jurisdiction shall develop an inventory of septic systems within its jurisdiction and establish a program to ensure that failure rates are minimized pending adoption of regulations as per Assembly Bill 885 regarding onsite waste water treatment systems.[footnote omitted]

2. Requirements of Federal Law

While the federal CWA regulations require MS4 permits to contain a "description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer," 40 CFR § 122.26(d)(2)(iv)(B)(4), nothing in the federal regulations address septic systems or the requirement to inventory such systems or to establish a program to minimize failure rates pending the adoption of state regulations. Nothing in the 2010 Permit establishes the releases from septic systems are entering the MS4, and nothing in Section IX.F links the inventory and failure rate minimization program to discharges from septic systems into the MS4. Moreover, the plain language of Section IX.F indicates that the provisions is intended to address septic system failures "pending adopt of regulations as per Assembly Bill 885," a requirement of state law set forth in Water Code §§ 13290-13291.7.

In the absence of any linkage to any requirement in the CWA or the CWA regulations, or of any factual link between septic system discharges and the entry of pollutants into the MS4, Section IX.F represents the imposition of a state mandate on the Permittees.

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3. Requirements of 2002 Permit

Nothing in the 2002 Permit required an inventory of septic systems or the establishment of a program to ensure that failure rates be minimized. Thus, Section XII.F represents a new program imposed on local agencies.

4. Mandated Activities

Permittees with septic systems in their jurisdictions, which include Claimants, must inventory all such systems and establish a program to "ensure" that failure rates are minimized pending adoption of state regulations.

5. Actual and Estimated Increased Costs

The work required to develop the inventories is being done by the permittees, including Claimants, through joint activities funded through the Implementation Agreement and development of an electronic Geodatabase using GIS technology reflecting the presence of the septic systems. Individual permittees, including Claimants, will be required to update the database as additional septic systems are added or deleted from their jurisdictions. The development of the failure reduction program is being coordinated by the Principal Permittee as an areawide program through the Implementation Agreement, with funding from the permittees.

The actual and/or estimated cost to the permittees of identifying and inventorying the septic systems, and of developing and establish a failure rate minimization program during FYs 2009-2010 and 2010-2011 has exceeded $1,000 and is expected to exceed $1,000 in FYs. *See* Declarations in Section 6.

G. Permittee Inspection Requirements

Section X of the 2010 Permit contains a number of permittee inspection requirements, including requirements that are not recoverable from inspection fees. In addition, this section requires development of a new program related to residential areas, which cannot be recovered through facility inspection fees, as well as the development of BMPs and BMP Fact Sheets related to new categories of facilities, including mobile businesses, as well as the requirement to implement enforcement proceedings, which is unrelated to the inspection per se and which requires staff resources to be utilized. In addition, the permittees, including Claimants, are required to evaluate the residential program in their annual reports. These enhanced responsibilities relate to requirements to add additional facilities to the inspection, BMP development and enforcement responsibilities of the permittees, including Claimants.

1. Applicable Requirements in 2010 Permit

This Test Claim alleges that the following subsections of Section X of the 2010 Permit represent an unfunded state mandate: Subsections A.3, A.7, A.8, A.9, B.3 (relevant portions), C.4, D.1 (relevant portions), D.2, D.4 (relevant portions), D.6, D.7, E.1, E.2, E.5 and E.7. Due to their length, these provisions are set forth in Exhibit 2 to this Section 5.

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2. Requirements of Federal Law

The CWA regulations set forth the list of facilities required to be inspected by a municipality acting under an MS4 NPDES permit: municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of Title III of the Superfund Amendment and Reauthorization Act of 1986, and industrial facilities determined by the municipality to be contributing a substantial pollutant loading to the MS4. 40 C.F.R. § 122.26(d)(2)(iv)(C). The regulations do not require inspections of construction sites, much less require the tasks outlined above, or the inspection of the categories of commercial facilities listed above. The regulations do not require that municipalities require industrial or commercial facilities to adopt source control and pollution prevention measures consistent with BMP Fact Sheets. Additionally, the requirement to address pre-production plastic pellet transportation, storage and transfer facilities derives directly from state law, in particular Water Code § 13367, which requires the State Board and regional boards to "implement a program to control discharges of pre-production plastic from point and nonpoint sources." 2010 Permit, Finding E.16.

Similarly, neither the CWA nor the CWA regulations require the development of, or evaluation of, a residential program. The only requirement in the CWA regulations applicable to residential areas is the requirement to include

> Structural and source control measures to reduce pollutants from runoff from commercial 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 implement such controls.

40 CFR § 122.26(d)(2)(iv)(A). This provision was cited by the RWQCB in the Fact Sheet as support for the requirement to address residential areas. *See* Fact Sheet at 32. These requirements do not mandate the requirements for the development of residential area program set forth in the 2010 Permit. And, as noted above, where the state freely chooses to impose costs associated with a new program or higher level of service upon a local agency, even as a means of implementing a federal program, those costs represent a reimbursable state mandate. *Hayes, supra,* 11 Cal. App.4th at 1593-94.

In addition, with respect to industrial and construction sites, the RWQCB already is required to inspect such sites, and is authorized under the Porter-Cologne Act to collect fees for such inspections. *See* discussion in Paragraph III above. The shifting of this inspection requirement from the state to the municipalities is a state mandate, as was found by the Commission in deciding the Los Angeles County Test Claim.

3. Requirements of 2002 Permit

The 2002 Permit adopted by the RWQCB did not contain any of the requirements set forth in Paragraph VI.E.1 above.

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4. Mandated Activities

The requirements in Section X of the 2010 Permit set forth above require the permittees, including Claimants, to

-- Document municipal inspection programs in an electronic database;

-- Verify during inspections or prior to permit issuance whether a site has required permits;

-- Implement enforcement proceedings against facilities operating without a proper permit;

-- Maintain copies of records related to inspections, including inspection reports and enforcement actions;

-- During construction site inspections, verify coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs;

-- Require industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets;

-- Develop BMPs for each of several categories of commercial facilities and include facilities in inspection database;

-- Require commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets;

-- Identify and notify all mobile businesses regarding requirements of the Order and source control and pollution prevention measures they must adopt, and develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom;

-- Develop a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, develop and implement control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluate the applicability of programs to encourage efficient water use and minimize runoff; and

-- Include an evaluation of the residential program in the annual report.

Again, it may be noted that the Commission already has determined that program assessment, such as that required in Section X of the 2010 permit, required beyond the CWA regulations constitutes an unfunded state mandate. *See* San Diego County Test Claim at 85-91.

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5. Actual and Estimated Increased Costs

To comply with the requirements set forth in Section X of the 2010 Permit, the permittees, including Claimants herein, will be required to spend monies to comply with the mandated activities described above.

Specific costs associated with complying with these new mandated programs will be either shared among the permittees through the Implementation Agreement, or be borne individually by each permittee. The development of BMP Fact Sheet and handouts will be conducted jointly through Implementation Agreement funding, while individual permittees will be required to undertake field activities.

Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations included in Section 6.

H. Enhanced New Development Requirements

Section XI of the 2010 Permit contains a number of requirements that expand the responsibilities required of the permittees, including Claimants, with respect to the regulation of stormwater discharges from new developments and significant re-developments, including the development of a Watershed Action Plan ("WAP") and the required incorporation of Low Impact Development ("LID") principles, and are set forth in Paragraph VI.F.1 below and summarized in Paragraph VI.F.4 below.

1. Applicable Requirements in 2010 Permit

The requirements set forth in Section XI that are the subject of this test claim are numerous and detailed. They are subsections A.7, A.9, B.1-B.4, C.1, D.1 (relevant portions), E.1, E.3, E.4-E.10, F., G.1 (relevant portions), I.2, J., K.1 (relevant portions) and K.2, found in the 2010 Permit (attached in Section 7) at pages 73-92. Due to their length, these provisions are separately set forth in Attachment 3 to this Section 5. In addition, MRP Section V.B.2 provides that the "Principal Permittee shall continue to participate in data collection and monitoring to assess the effectiveness of LID techniques in semi-arid climate as part of the SMC project titled, 'Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California.'" MRP, page 10. In addition, Section IV.B.4 of the MRP contains requirements relating to the HMP, and specifies that the HMP must include "[p]rotocols for ongoing monitoring to assess drainage channels deemed most susceptible to degradation, and to assess the effectiveness in preventing or reducing impacts from hydromodification within the permitted area" and "[m]odels to predict the effects of urbanization on stream stability within the permitted area." MRP, Section IV.B.4, page 7.

2. Requirements of Federal Law

The federal CWA regulations require that MS4 permits include a

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> description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant new redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

40 CFR § 122.26(d)(2)(iv)(A)(2). This is the regulation cited by the RWQCB in the Fact Sheet (Fact Sheet at 32) as support for these provisions. Planning procedures were included in the response to the requirements of Section XII.A of the 2002 Permit.

The requirements in Section XI of the 2010 Permit included in this Test Claim either are not required by the CWA or the CWA regulations or represent the free choice of the RWQCB to incorporate those provisions into the 2010 Permit and, as such, represent a state mandate. First, the requirements relating to the WAP and the incorporation of watershed protection principles into planning processes are not a federal mandate. Instead they stem from a determination by RWQCB staff, upon evaluating the management programs established under the 2002 Permit, that there was "a need for establishing a need for improved integration between the watershed protection principles, including LID techniques, into the planning and approval processes of the Permittees." Fact Sheet, p. 33. Thus, the decision to require development and implementation of the WAP program was the free choice of the RWQCB, not a federal requirement. *Hayes, supra,* 11 Cal. App.4th at 1593-94.

Second, the incorporation of similar LID and hydromodification requirements on new development projects (which forms only a portion of the extensive requirements of Section XI) has previously been determined by the Commission, in the San Diego County Test Claim, to represent a state mandate. San Diego County Test Claim at 41-54. However, the Commission found that the LID and hydromodification requirements were not *reimbursable* state mandates because the San Diego County test claimants were not under an obligation to construct projects that would trigger the permit requirements. San Diego County Test Claim at 46, 52.

In support of this position, the Commission cited the California Supreme Court's decision in *Department of Finance v. Comm'n on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. In that case, the Court held that certain hearing requirements imposed upon school district did not constitute a reimbursable state mandate because they were a requirement of a voluntary program that the districts had elected to participate in. The Court held that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement.

The Court relied on *City of Merced v. State of California* (1984) 153 Cal.App.3d 777. In that case, the city elected to take property by eminent domain. Then-recent legislation required the city to compensate the property owner for loss of business goodwill. The city argued that the legislation constituted a reimbursable state mandate. The Court of Appeal concluded that the city's increased costs flowed from its voluntary decision to condemn the property. 153 Cal.App.3d at 783.

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The facts that dictated the Supreme Court's decision in *Kern High School Dist.* are not present in this Test Claim. First, the MS4 permit program is not a voluntary program, but one required of municipalities with MS4 systems of a certain size. Second, the Permit requires the permittees, including Claimants, to take various mandatory steps, including incurring costs related the imposition of LID and hydromodification requirements on any municipal project, which could include projects constructing or rehabilitating hospitals, medical facilities, parks, parking lots and other facilities. These projects are not "optional" but rather are integral to the permittees' function as municipal entities. The failure to repair, upgrade or extend such facilities can pose a threat to public health and safety, and expose the permittees to liability.

City of Merced likewise is not applicable. In that case, the City had the choice either of purchasing the property in question or condemning it. The 2010 Permit offers no such options to the permittees, including Claimants. Permittees have no choice in designing their development projects to avoid imposition of the Permit requirements, since the requirements apply uniformly to a variety of projects depending only their size or location and include public projects. *See* 2010 Permit, Section XI.D.4.a-i.

It may be noted that the California Supreme Court recently has rejected application of *City of Merced* beyond the circumstances present in *Kern High School Dist.* In *San Diego Unified School Dist. v. Comm'n on State Mandates* (2004) 33 Cal.4th 859, the Court discussed *Kern High School Dist.* at length and cautioned against further reliance on the holding in *City of Merced:*

> [T]here is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514 whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced,* public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 . . . and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example . . . in *Carmel Valley, supra,* 190 Cal.App.3d 521, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing. . . . The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* . . . such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to

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endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.

33 Cal.4th at 887-88.

Thus, reliance on the *City of Merced* rationale is appropriate *only* in the very limited circumstances presented in *Kern High School Dist.* These circumstances are not present with respect to the above-noted provisions of the 2010 Permit relating to the imposition of LID and hydromodification principles to public development projects.

A number of additional requirements in Section XI of the 2010 Permit do not involve even arguable "discretionary" projects, but rather the requirement to develop standard design and post-development procedures and standards, including incorporation of BMPs into the design for culvert projects (Section XI.A.7), the creation of the WAP itself (as well as the creation, maintenance and integration of the Watershed Geodatabase and the required evaluation of watershed conditions) (Section XI.B), the review and revision of the General Plan and zoning codes to eliminate barriers to implementation of LID principles and HCOC (Section XI.C.1), the updating of the WQMP Guidance and Template (Section XI.D.2), the promotion of LID (including the revision of the WQMP Guidance and Template) (Section XI.E), BMP guidance for road and highway projects (Section XI.F), the creation and maintenance of a database for tracking the operation and maintenance of structural and post-construction BMPs (Sections XI.J.2 and XI.K.2), and the inspection of structural post-construction BMPs owned by permittees (Section XI.K.1). These requirements, and others in Section XI, do not involve the "choice" of the permittees to build a project, but rather to develop a program to govern project development. Moreover, these requirements mandate the outlay of local funds without the ability to recover those funds through inspection fees, as might be the case for requirements relating to a private development project.

3. Requirements of 2002 Permit

While the 2002 Permit contained certain requirements applicable to new development projects (2002 Permit, Section VIII), none of the requirements in the 2010 Permit set forth above is included in the 2002 Permit. Thus, the requirements represent a new program and/or higher level of service imposed on the permittees, including Claimants.

4. Mandated Activities

The requirements of Section XI included in this Test Claim are numerous, but include the following requirements:

-- to ensure that control measures to reduce erosion and maintain stream geomorphology are included in the design for culverts and/or bridge crossings;

-- to develop a WAP, requiring review of watershed protection principles and policies in planning procedures, development of the WAP to describe and implement the permittees' approach to coordinated watershed management, including, in Phase 1, identifying program-specific objectives for the WAP, development of a structure for the WAP, identifying linkages

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between the WAP and other plans, identification of other relevant watershed efforts, ensuring that the HCOC Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information, developing a schedule and procedure for maintaining the Geodatabase, reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase, identifying potential causes of identified stream degradation, conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies, conduct a system wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification, invite participation and comments from stakeholders regarding the development and use of the Geodatabase and submit the Phase 1 elements to the RWQCB executive officer for approval. Further, in Phase 2, the permittees are required to specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs, develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation, develop and implement a HMP prioritized on specified bases (including with respect to protocols and modeling se4t forth in the MRP), conduct training workshops in the use of the Geodatabase, conduct demonstration workshops for the Geodatabase to be attended by senior permittee staff, develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs, implement applicable retrofit or regional treatment recommendations, and submit the Phase 2 components in a report to the Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions.

-- to review each permittee's general plan and related documents to eliminate any barriers to implementation of LID principles and HCOC requirements, with any changes in project approval process or procedures to be reflected in the LIP.

-- for each permittee to review its General Plan and related documents to eliminate barriers to the implementation of LID principles and Hydrologic Conditions of Concern ("HCOC").

-- for the Principal Permittee to submit a revised WQMP Guidance and Template to incorporate the new elements required by the 2010 Permit.

-- to evaluate potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs, to update landscape ordinances consistent with the requirements of AB 1881, to address hydromodification and manage storm water as a resource through use of site design BMPs that incorporate LID techniques in a specified manner, require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event, to review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; to

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ensure that the WQMP specifies methods for determining time of concentration; to conduct a feasibility analysis to determine the feasibility of implement LID; to integrate the WAP and TMDL implementation plans into project-specific SWQMPs in affected watersheds; to submit the updated SWQMP Guidance and Template to the RWQCB Executive Officer and to implement the Guidance and Template after approval or, alternatively, to require implementation of LID BMP)s or determine infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; to, if site conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

-- to develop standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submittal of the draft guidance to the Executive Officer; ensure that the guidance follows certain principles contained in U.S. EPA guidance; and implement the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

-- to inspect post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

-- to establish a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and to maintain a database to track all structural treatment control BMPs, including locations and responsible parties;

-- to ensure that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and to ensure, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated; and

-- to develop a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report.

In addition, the MRP requires the Principal Permittee to participate in a study to quantify the effectiveness of site design and LID BMPs in Southern California. This requirement is new to the Permit, and requires a new program to be conducted by the Principal Permittee.

5. Actual and Estimated Increased Costs

To comply with the requirements set forth in Section XI of the 2010 Permit identified in this Test Claim, the permittees, including Claimants herein, will be required to spend monies to develop BMPs, develop and implement a WAP (including the numerous requirements associated with such preparation, including identifying objectives, developing a structure, identifying linkages with other plans, developing the watershed Geodatabase, identifying potential causes of stream degradation, evaluate opportunities to retrofit existing stormwater conveyance system and recreational areas, invite comments from agencies and other stakeholders, specify procedures, develop and implement a HMP, review and if required, amend each General Plan and related documents, revise and submit a revised WQMP meeting specific requirements, develop a

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procedure for streamlining regulatory agency approval, incorporate LID principles and require permittee development and redevelopment projects to adopt those principles, revise ordinances and design codes to promote LID techniques, review permittee projects for HCOCs and mitigate such HCOCs, develop standard design and post-development BMP guidance for streets, roads and highways, develop criteria to determine the feasibility of implementing LID BMPs, install, operate and maintain additional BMPs, maintain a database to track structural post construction BMPs, and routinely inspect post-construction structural BMPs.

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including Claimants, through the Implementation Agreement. Each permittee, however, is required to individually fund the implementation of any regionally-devised programs, as well as carry out all other aspects of the requirements of Section XI of the 2010 Permit that apply to permittee-specific activities.

A portion of the costs for the tasks required under Section XI of the 2010 Permit may be recoverable from private developers through fees associated through development fees. However, such fees will not be applicable to public development project requiring a WQMP. Additionally, Proposition 26 may further limit the ability of the permittees to charge fees to recover costs associated with development. Moreover, as discussed above, the programs at issue in this Test Claim are ones requiring the development of plans, templates, databases, BMPs, guidance, and other administrative structures which cannot be recovered through development or other fees.

Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations included in Section 6.

I. Public Education and Outreach

Section XII.A of the 2010 Permit requires that permittees, including Claimants, must annually review their public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment. Such program assessment requirements have been identified as unfunded state mandates by the Commission.

1. Requirements of 2010 Permit

SECTION XII

A. [relevant portions] Each year the Permittees shall review their public education and outreach efforts and revise their activities to adopt to the needs identified in the annual reassessment of program priorities with particular emphasis on addressing the most critical behaviors that cause storm water pollution problems. Any changes to the on-going public education program must be described in the annual report.

2. Requirements of Federal Law

Neither the CWA nor the federal CWA regulations require the assessment of public education efforts required in Section XII.A as an element of MS4 permits. The Commission, in the San Diego County Test Claim, previously has ruled that program assessment activities represent a state mandate. San Diego County Test Claim, 83-86. Thus, the requirements in Section XII.A is a state mandate, not a federal requirement.

3. Requirements of 2002 Permit

The annual assessment requirement contained in the 2010 Permit was not part of the 2002 Permit, and thus represents a new program and/or higher level of service required only of municipalities.

4. Mandated Activities

Section XII.A of the 2010 Permit requires the permittees to annually review their public education and outreach programs and to revise them to adapt to the needs identified, and to describe those changes in the permittees' annual reports.

5. Actual and Estimated Increased Costs

The work of reviewing the public education and outreach efforts and reporting is being conducted by the permittees jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including Claimants.

Claimants' costs and estimated future costs to fund this mandate exceeded $1,000 during FY 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations included in Section 6.

J. New Permittee Facilities and Activities Requirements

Section XIII of the 2010 Permit requires the Permittees, including Claimants, to inventory their fixed facilities, field operations and drainage facilities, to inspect those facilities on an annual basis, to annually evaluate the inspection and cleanout frequency of drainage facilities, including catch basins, and to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revisions to maintenance procedures or schedules.

1. Requirements of 2010 Permit

Section XIII

A. Each Permittee shall inventory its fixed facilities, field operations, and drainage facilities, and shall conduct inspections of these facilities on an annual basis to ensure that

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these facilities and activities do not contribute pollutants to receiving waters, consistent with the MEP standard. At a minimum, the following municipal facilities, that are owned and/or operated by the Permittees, shall be inspected. Records of these facilities and inspection findings shall be maintained in a database:

1. *Public streets, roads (including rural roads) and highways within its jurisdiction;*

2. *Parking facilities;*

3. *Fire fighting training facilities;*

4. *Flood management projects and flood control structures;*

5. *Areas or facilities and activities discharging directly to environmentally sensitive areas such as 303(d) listed waterbodies or those with a RARE beneficial use designation;*

6. *Publicly owned treatment works (including water and wastewater treatment plants)*

    a. *Sanitary sewage collection systems shall be adequately maintained to minimize overflows, leaks, or other failures (also see requirements in Section IX, above), but need not be inspected annually unless deemed to be necessary;*

7. *Solid waste transfer facilities;*

8. *Land application*[5] *sites;*

9. *Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and*

10. *Household hazardous waste collection facilities.*

11. *Municipal airfields.*

12. *Parks and recreation facilities.*

13. *Special event venues following special events (festivals, sporting events).*

14. *Power washing.*

15. *Other municipal areas and activities that the Permittee determines to be a potential source of pollutants.*

E. The Permittees' shall evaluate, annually, the inspection and cleanout frequency of drainage facilities, including catch basins, referred to in Section B and C, above. This evaluation shall consider the data generated by historic and ongoing inspections and

[5] Examples are compost application, animal/dairy manure application, and biosolids application

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cleanout of these facilities, and the IC/ID program (Section VIII). The evaluation shall be based on a prioritized list of drainage facilities considering factors such as: proximity to receiving waters, receiving water beneficial uses and impairments of beneficial uses, historical pollutant types and loads from past inspections/cleanings and the presence of downstream regional facilities that would remove the types of pollutants found in the drainage facility. Using this list, the Permittees shall revise their inspection and clean out schedules and frequency and provide justification for any proposed clean out frequency that is less than once a year. This information shall be included in the annual report.

I. Each Permittee shall annually evaluate the information provided to field staff during their maintenance activities to direct public outreach efforts and determine the need for revision of existing maintenance procedures or schedules. The results of this evaluation shall be provided in the annual report.

2. Requirements of Federal Law

There is no requirement in the CWA or in the CWA regulations for the inventory/inspection requirements set forth in Section XIII.A or for the requirement to annually evaluate the inspection frequency for MS4 components or the information provided to field staff. Additionally, the Commission has already ruled that program assessment, such as required in Sections XIII.E and XIII.I, represented state mandates. San Diego County Test Claim, 83-86.

3. Requirements of 2002 Permit

None of the provisions set forth above were contained in the 2002 Permit. Thus, the requirements of Section XIII of the 2010 Permit represent new programs and/or a higher level of service.

4. Mandated Activities

The Permittees, including Claimants, are required to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database. Additionally, the Permittees are required to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports. Finally, the Permittees are required to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report.

5. Actual and Estimated Increased Costs

The work to conduct the additional requirements set forth in Section XIII will involve both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the construction of the Geodatabase and individually by each permittee, as each permittee is required to provide information on facilities. The evaluation of the frequency of

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storm drain system cleaning is being conducted jointly by the permittees, while the revision of maintenance schedules and the reporting of such efforts will be done by individual permittees.

Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations included in Section 6.

K. Training Requirements

Section XVI of the 2010 Permit requires the permittees, including Claimants, to conduct formal training of their employees responsible for implementing the requirements of the 2010 Permit, and also for the Principal Permittee to conduct additional training.

1. Requirements of 2010 Permit

SECTION XVI

A. Within 24 months from the date of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, will update their existing training program to incorporate new or revised program elements related to the development of the LID program, revised WQMP, and establishment of LIPs for each Permittee. The updated training program includes a training schedule, curriculum content, and defined expertise and competencies for storm water managers, inspectors, maintenance staff, those involved in the review and approval of WQMPs, public works employees, community planners and for those preparing and/or reviewing CEQA documentation and for municipal contractors working on Permittee projects.

1. Within 36 months, the Permittees will update training program elements to incorporate new or enhanced storm water program elements due for completion within 36 months of permit adoption.

2. By 48 months, the Permittees will have a completely revised training program that includes any enhanced or new program elements not previously addressed, including the WAP.

B. The curriculum content should include: federal, state and local water quality laws and regulations as they apply to construction and grading activities, industrial and commercial activities; the potential effects of construction, industrial and commercial activities and urbanization on water quality; implementation and maintenance of erosion and sediment control BMPs and pollution prevention measures; the proper use and maintenance of erosion and sediment controls; the enforcement protocols and methods established in the MSWMP, LIP, WQMP, including LID Principles and Hydrologic Conditions of Concern, the CASQA Construction Stormwater Guidance Manual, Enforcement Response Guide and Illicit Discharge/Illegal Connection Training Program. The training program should address vector control issues related to storm water pollution control BMPs.

C. The training modules for each category of trainees (managers, inspectors, planners, engineers, contractors, public works crew, etc.) should define the required competencies,

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outline the curriculum, and include a testing procedure at the end of the training program and proof of completion of training (Certificate of Completion).

D. At least on an annual basis, the Principal Permittee shall provide and document training to applicable public agency staff on the updated Municipal Activities and Pollution Prevention Strategy (MAPPS), and any other applicable guidance and procedures developed by the Permittees to address Permittee activities in fixed facilities as well as field operations, including conveyance system maintenance. Each Permittee shall document training for its staff related to jurisdiction-specific responsibility, procedures and implementation protocols established in its LIP. The field program training should include Model Integrated Pest Management pesticide and fertilizer guidelines. Appropriate staff from each municipality shall attend at least three of these training sessions during the term of this Order. The training sessions may be conducted in classrooms or using videos, DVDs, or other multimedia with appropriate documentation and a final test to verify that the material has been properly reviewed and understood. In instances where applicable municipal operations are performed by contract staff, each Permittee shall require evidence that contract staff have received a level of training equivalent to that listed above.

E. The Principal Permittee shall provide and document training for public employees and interested consultants that incorporates at a minimum, the requirements in this Order related to new development and significant re-development and 401 certifications, and model environmental review (CEQA review) for preparation of environmental documents.

F. The Principal Permittee shall provide training information to municipal contractors to assist the contractors in training their staff. In instances where applicable municipal operations are performed by contract staff, the Permittees shall require evidence that contract staff have received a level of training equivalent to that listed above.

G. The Principal Permittee shall either notify designated Regional Board staff regarding training events via e-mail or submit course content in advance of training sessions.

H. Each Permittee shall adequately train any of its staff involved with storm water related projects and the implementation of this Order within six months from being assigned these duties and on an annual basis thereafter, prior to the rainy season.

2. Requirements of Federal Law

Neither the CWA nor the federal CWA regulations require the training required in Section XVI as an element of MS4 permits. No federal regulations are cited in the Fact Sheet as support for this program. Fact Sheet, page 36. The requirements in Section XVI are state mandates, not federal requirements.

3. Requirements of 2002 Permit

The 2002 Permit contained limited training requirements for Permittee staff, focused on training for persons conducting inspection of industrial and commercial sites. *See* 2002 Permit Sections IX.9; X.9. However, the requirements set forth in Section XVI of the 2010 Permit are

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specifically required to update the "existing training program" and to include provisions set forth for the first time in the 2010 Permit, such as training requirements for staff other than site inspectors. Thus, the requirements in Section XVI of the 2010 Permit represent both a new requirement, for provisions that go beyond the requirements of the 2002 Permit, and a higher level of service with regard to the enhancement of the 2002 Permit's industrial and commercial site training requirements.

4. Mandated Activities

The provisions of Section XVI set forth above require the permittees, including Claimants, to update their training programs to meet the requirements of the 2010 Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the 2010 Permit and to provide such training annually prior to the rainy season, and for the Principal Permittee to provide and document training for public employees and interested consultants regarding the 2010 Permit and training to municipal contractors to assist in their training of contractor staff.

5. Actual and Estimated Increased Costs

The increased costs resulting from the development of training described in Paragraph K.1 above primarily are being borne by the permittees, including Claimants, jointly through the Implementation Agreement. In addition, the Principal Permittee will incur individual costs concerning its obligations under Section XVI of the 2010 Permit. Costs associated with the training of individual permittee staff, as required by Section XVI.H of the permit, will be incurred by individual permittees.

Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations included in Section 6.

L. Reporting of Non-Compliant Facilities

Section XVII.D of the 2010 Permit requires permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB pursuant to a specified set of requirements.

1. Requirements of 2010 Permit

SECTION XVII

D. As specified in Section X.A.7, the Permittees shall deem facilities operating without a proper permit to be in significant non-compliance. These facilities shall be reported within 14 calendar days to the Regional Board by electronic mail or other written means. Permittees' notifications of facilities' failure to obtain required permits under the Construction Activities Storm Water General Permit (Construction Permit), Industrial

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Activities Storm Water General Permit (Industrial Permit), including Requirements to file a Notice of Intent or No Exposure Certification, Notice of Non-applicability, and/or 401 Certification must include, at a minimum, the following documentation:

1. Name of the facility;

2. Operator of the facility;

3. Owner of the facility;

4. Construction/Commercial/industrial activity being conducted at the facility that is subject to the Construction//Industrial General Permit, or 401 Certification; and

5. Records of communication with the facility operator regarding the violation, including an inspection report.

2. Requirements of Federal Law

Nothing in the CWA or in the CWA stormwater regulations requires a municipality to act as an enforcement arm of the RWQCB with respect to facilities that may be operating without a proper stormwater permit. MS4 permittees are required to have a program, including inspections "to implement and enforce an ordinance, orders or similar means to prevent illicit discharges" to the MS4, as well as to inspect certain specified facilities (a category far smaller than the category of facilities set forth in Section XVII.D of the 2010 Permit, as noted above) for the purpose of monitoring and controlling "pollutants in storm water discharges" to the MS4. 40 CFR 122.26(d)(iv)(B)(1)(C). The Commission has previously found that these inspection requirements establish the bounds of federal requirement; inspection requirements that, for example, require inspections to comply with state general permits at facilities that are not included within the CWA regulatory list represents a state mandate, freely imposed by the RWQCB. Los Angeles County Test Claim Statement of Decision, 35-48.

In Section XVII.D, the RWQCB has taken a further step, requiring the permittees, including Claimants, to divulge and report the results of the state-mandated inspections regarding the facility's obtaining of statewide general NPDES permits, an individual NPDES permit or a Section 401 certification (which is required under the CWA to be issued by a state when a project receives a Section 404 permit for the discharge of material into a water of the United States, certifying that the project complies with *state* law). The CWA regulations nowhere require that municipal inspections require either confirmation of permit status or the reporting of non-compliance. Section XVII.D transfers a state enforcement obligation to the permittees, an obligation which is a new program and/or higher level of service.

3. Requirements of 2002 Permit

None of the notification requirements contained in Section XVII.D of the 2010 Permit were contained in the 2002 Permit. Thus, these requirements impose a new program and/or higher level of service on the permittees, including Claimants.

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4. Mandated Activities

Permittees, including Claimants, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a CWA Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report.

This provision requires Permittees, including Claimants, to act as an enforcement arm of the RWQCB or the State Board, and transfer the obligations of those state agencies under the CWA and the California Porter-Cologne Act to municipalities.

5. Actual and Estimated Increased Costs

The requirements of Section XVII.D of the 2010 Permit require the permittees, including Claimants, to use staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report that information to the RWQCB within a specified time frame.

Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and are expected to exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations in Section 6.

M. Program Management Assessment/MSWMP Review

Section XVIII.B.3 of the 2010 Permit contains a new requirement requiring the Permittees, including Claimants, to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.

1. Requirements of 2010 Permit

SECTION XVIII

B. [relevant portions] In addition, the first annual report after adoption of this Order shall include the following:

3. Propose any changes to assess program effectiveness on an area-wide and jurisdictional basis. Permittees may utilize the CASQA Guidance for developing these assessment measures at the six outcome levels. The assessment measures must target both water quality outcomes and the results of municipal enforcement activities. [footnote omitted]

Please also see MRP Section VII.E.4, included in Section 7 of the Test Claim, which reflects the requirements of Section XVIII.B.3, and requires the permittees to conduct an assessment which includes "water quality improvements and pollutant load reductions resulting from implementation of various program elements" and for "each program element required under this Order, the expected outcome, and the measures used to assess the outcome. The Permittees may propose any other methodology for program assessment using measureable target outcomes."

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2. Requirements of Federal Law

The federal CWA regulations contain a provision requiring "assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water." 40 CFR § 122.26(d)(2)(v).

However, the Commission already has determined in the San Diego County Test Claim that similar (albeit more elaborate) program assessment requirements in the San Diego County MS4 Permit were a state, not federal, mandate, because the federal regulatory requirements did not specify the detailed assessment set forth in that permit. San Diego County Test Claim, 83-86. Similarly, the requirements of Section XVIII.B.3 are far more detailed and specific than those general assessment requirements. The 2010 Permit requires assessment on an area-wide as well as jurisdiction-specific basis, and requires use of guidance that employs assessment measures at six outcome levels, targeting both water quality outcomes and the result of municipal enforcement activities. None of this specificity is set forth in the federal regulations and the requirements of Section XVIII.B.3 and MRP Section VII.E.4 are therefore state, and not federal, mandates.

3. Requirements of 2002 Permit

The 2002 Permit did not contain the assessment requirements set forth in Section XVIII.B.3 of the 2010 Permit. Thus, those requirements impose a new program and/or higher level of service on the permittees, including Claimants.

4. Mandated Activities

The requirements set forth in Section XVIII.B.3 of the 2010 Permit (and in Section VII.E.4 of the MRP) require the permittees, including claimants, to develop and submit a proposal for assessment of the management program effectiveness, including water quality outcomes and the results of municipal enforcement activities. The result of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the 2010 Permit. Further, it requires the Permittees to annually analyze that information for inferences that can be garnered regarding the effectiveness of their programs, and to describe the findings and recommendations related to that analysis in annual reports, as required by Section XVIII.C.

5. Actual and Estimated Increased Costs

The work associated with the development of the assessment of the Urban Runoff management program, which is the MSWMP, is being conducted by the Principal Permittee on behalf of the other permittees, with the permittees paying shares of the cost pursuant to the Implementation Agreement. Implementation of the requirement will be accomplished by each individual permittee. Additionally, the permittees will be required potentially to revise their programs to meet the requirements identified by the assessment.

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Claimants' costs and estimated future costs to fund this mandate have exceeded $1,000 during FYs 2009-2010 and 2010-2011 and will exceed $1,000 during succeeding FYs over the course of the 2010 Permit. *See* Declarations in Section 6.

VII. STATEWIDE COST ESTIMATE

The provisions of the 2010 Permit only apply to portions of San Bernardino County within the boundaries of the Santa Ana Region and therefore, the cost estimates provided in this Test Claim relate only to that geographic area. Those costs are set forth in the declarations submitted in Section 6 of this Test Claim.

VIII. FUNDING SOURCES

The Claimants are not aware of any designated State, federal or non-local agency funds that are or will be available to fund the mandated activities set forth in this Test Claim. As set forth in the Declarations in Section 6 of this Test Claim, some Claimants assess inspection fees or new development review fees that fund some aspects of 2010 Permit activities, some Claimants assess stormdrain fees that cover certain Permit expenses, including staff expenses and one Claimant assesses a stormdrain capital improvement fee that funds limited 2010 Permit activities. However, as also set forth in those declarations, in no cases are Claimants able to fund through fees all of the increased costs represented by the programs and activities set forth in this Test Claim. Moreover, the adoption of Proposition 26 by the voters in November, which restricts the ability of local agencies to assess fees that cover than the actual burden or benefit being provided to the payer, further affects the ability of Claimants to offset the new and additional costs imposed in the 2010 Permit.

IX. PRIOR MANDATE DETERMINATIONS

A. Los Angeles County Test Claim

In 2003 and 2007, the County of Los Angeles and 14 cities within the county ("Los Angeles County claimants") submitted test claims 03-TC-04, 03-TC-19, 03-TC-19, 03-TC-20 and 03-TC-21. These test claims asserted that provisions of Los Angeles RWQCB Order No. 01-182 constituted unfunded state mandates. Order No. 01-182, like the 2010 Permit at issue in this Test Claim, was a renewal of an existing MS4 permit. The provisions challenged in these test claims concerned the requirement for the Los Angeles County claimants to install and maintain trash receptacles at transit stops and to inspect certain industrial, construction and commercial facilities for compliance with local and/or state storm water requirements.

The Commission, in a final decision issued on September 3, 2009, determined that the trash receptacle requirement was a reimbursable state mandate. *In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-192*, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21. The Commission found that the portion of the test claims relating to the inspection requirement was a state mandate, but that the Los Angeles County claimants had fee authority sufficient to fund such inspections.

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The Commission has approved parameters and guidelines for the trash receptacle mandate, and the State Department of Finance has issued Claiming Instructions to the affected local agencies.

B. San Diego County Test Claim

In 2007, the County of San Diego and 21 cities within the county (the "San Diego County claimants") submitted test claim 07-TC-09. This test claim asserted that several provisions of San Diego RWQCB Order No. R9-2007-0001 constituted reimbursable state mandates. This order was the renewal of the existing MS4 permit for the San Diego County claimants.

On March 30, 2010, the Commission issued a final decision entitled *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, Case No. 07-TC-09. In that decision, the Commission found the following requirements to be reimbursable state mandates:

1. A requirement to conduct and report on street sweeping activities;

2. A requirement conduct and report on storm sewer cleaning;

3. A requirement to conduct public education with respect to specific target communities and on specific topics;

4. A requirement to conduct mandatory watershed activities and collaborate in a Watershed Urban Management Program;

5. A requirement to conduct program effectiveness assessments;

6. A requirement to conduct long-term effectiveness assessments; and

7. A requirement for permittee collaboration.

The Commission also found requirements for hydromodification and low impact development programs to be state mandates, but determined that because local agencies could charge fees to pay for these programs, they were not reimbursable state mandates.

X. CONCLUSION

The permittees, including Claimants, maintain a good working relationship with the Santa Ana RWQCB and its staff. Claimants are committed to working together with the RWQCB and other stakeholders to achieve the clean water goals set forth in the 2010 Permit.

Nonetheless, important elements of the 2010 Permit represent significant and expensive mandates at a time when the budgets of all local agencies, especially those in San Bernardino County, have been dramatically impacted by the recession. The Claimants submit that the mandates set forth in this Test Claim represent state mandates for which a subvention of funds is required, pursuant to article XIII B, section 6 of the California Constitution. Claimants

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respectfully request that the Commission make such finding as to each of the programs and activities set forth herein.

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ATTACHMENT 1 – Provisions in Section V.D of 2010 Permit

SECTION V.D

2. Final WQBELs for MSAR Bacterial Indicator TMDL under DRY Weather Conditions

a. The final WQBELs for bacterial indicators under Dry Weather Conditions contained in this section shall be achieved no later than December 31, 2015. These final effluent limits shall be considered effective for enforcement purposes on January 1, 2016.

b. The Final WQBELs for MSAR Bacterial Indicator TMDL under Dry Weather conditions shall be developed and implemented in the following manner.

i. The MSAR Permittees shall prepare for approval by the Regional Board a Comprehensive Bacteria Reduction Plan (CBRP) describing, in detail, the specific actions that have been taken or will be taken to achieve compliance with the urban wasteload allocation under dry weather conditions (April 1st through October 31st) by December 31,2015. The CBRP must include:

(a) The specific ordinance(s) adopted to reduce the concentration of indicator bacteria in urban sources.

(b) The specific BMPs implemented to reduce the concentration of indicator bacteria from urban sources and the water quality improvements expected to result from these BMPs.

(c) The specific inspection criteria used to identify and manage the urban sources most likely causing exceedances of water quality objectives for indicator bacteria.

(d) The specific regional treatment facilities and the locations where such facilities will be built to reduce the concentration of indicator bacteria discharged from urban sources and the expected water quality improvements to result when the facilities are complete.

(e) The scientific and technical documentation used to conclude that the CBRP, once fully implemented, is expected to achieve compliance with the urban wasteload allocation for indicator bacteria by December 31, 2015.

(f) A detailed schedule for implementing the CBRP. The schedule must identify discrete milestones to assess satisfactory progress toward meeting the urban wasteload allocations for dry weather by December 31, 2015. The schedule must also indicate which agency or agencies are responsible for meeting each milestone.

(g) The specific metric(s) that will be established to demonstrate the effectiveness of the CBRP and acceptable progress toward meeting the urban wasteload allocations for indicator bacteria by December 31, 2015.

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(h) The MSWMP, WQMP and LIPs shall be revised consistent with the CBRP no more than 180 days after the CBRP is approved by the Regional Board.

(i) Detailed descriptions of any additional BMPs planned, and the time required to implement those BMPs, in the event that data from the watershed-wide water quality monitoring program indicate that water quality objectives for indicator bacteria are still being exceeded after the CBRP is fully implemented.

(j) A schedule for developing a CBRP needed to comply with the urban wasteload allocation for indicator bacteria during wet weather conditions (November 1st thru March 31st) to achieve compliance by December 31, 2025.

ii. The draft CBRP must be submitted to the Regional Board no later than December 31,2010. The Permittees may submit the plan individually, jointly or through a collaborative effort with other urban dischargers such as the existing MSAR-TMDL Task Force. Regional Board staff will review the document and recommend necessary revisions no more than 90 days after receiving the draft plan. The MSAR Permittees must submit the final version of the plan no more than 90 days after receiving the comments from Regional Board staff. The Regional Board will schedule a public hearing to consider approving the CBRP, as a final water quality-based effluent limitation for the Dry Weather Urban Wasteload Allocation, no more than 120 days after the final plan is submitted by the MSAR Permittees. In approving the CBRP as the final WQBELs, the Regional Board shall make a finding that the CBRP, when fully implemented, shall achieve the urban wasteload allocations for indicator bacteria by no later than December 31, 2015.

iii. Once approved by the Regional Board, the CBRP shall be incorporated into this Order as the final WQBELs for indicator bacteria under Dry Weather Conditions. Based on BMP effectiveness analysis, the CBRP shall be updated, if necessary. The updated CBRP shall be implemented upon approval by the Regional Board.

c. Should the process set forth in subdivision, b, of this section not be completed by December 31, 2015, then the urban wasteload allocations for dry weather conditions specified in the MSAR-TMDL shall become the final numeric WQBELs for indicator bacteria in Dry Weather Conditions, effective January 1, 2016 as follows:

i. Wasteload Allocation for Fecal Coliform from Urban Sources in Dry Weather Conditions (April 1st through October 31 st)50 5-sample/30-day logarithmic mean less than 180 organisms/100mL and not more than 10% of the samples exceed 360 organisms/100mL for any 30-day period.

ii. Wasteload Allocation for E. Coli from Urban Sources in Dry Weather Conditions (April 1st through October 31 st)

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5-sample/30-day logarithmic mean less than 113 organisms/100 mL and not more than 10% of the samples exceed 212 organisms/100mL for any 30-day period.

3. Final WQBELs for MSAR Bacterial Indicator TMDL under WET Weather Conditions (effective Jan. 1, 2026)

In the event this Order is still in effect on December 31, 2025, and the Regional Board has not adopted alternative final water quality-based effluent limits for wet weather conditions by that date, then the urban wasteload allocations specified in the MSAR-TMDL for wet weather conditions (November 1st through March 31st) will automatically become the final numeric water quality-based effluent limits for the MSAR Permittees on January 1, 2026.

4. Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions

a. The City of Big Bear Lake, the County of San Bernardino and San Bernardino County Flood Control District (the Big Bear Lake MS4 Permittees) shall implement BMPs designed to assure continued compliance with the following urban wasteload allocation for phosphorus during dry hydrological conditions.

Total Phosphorus (lbs/yr)52 = 475 (Compliance to be achieved by December 31, 2015)[footnote omitted]

b. The Big Bear Lake MS4 Permittees shall implement BMPs in the watershed so as not to exceed the urban WLA for phosphorus.

c. The Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force, shall implement the approved (Regional Board Resolution No. R8-2008-0070) Big Bear Lake In-lake Nutrient Monitoring Plan dated November 30, 2007, or any lawfully approved amendments thereto. Annual Reports shall be submitted by February 15 of each year.

d. The Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Taskforce, shall implement the approved (Regional Board Resolution No. R8-2009-0043) Big Bear Lake Watershed-wide Nutrient Monitoring Plan (May 2009) in accordance with the schedules specified in Resolution No. R8-2009-0043, or any lawfully approved amendments thereto. Annual Reports shall be submitted by February 15 of each year.

e. No later than February 26, 2010, the Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force, shall submit for approval a plan to evaluate the applicability and feasibility of various in-lake treatment technologies to control noxious and nuisance aquatic plants as described in Task 6e of the BBL-TMDL. The plan shall also include a description of the monitoring conducted and proposed to track aquatic plant diversity, coverage, and biomass. The monitoring data should address, at a minimum, progress toward achieving the numeric targets for macrophyte coverage and percentage of nuisance

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aquatic vascular plant species. The final approved plan shall be implemented in accordance with the approved schedule.

f. No later than March 31 2010, the Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force, shall submit for approval a plan and schedule for updating the existing Big Bear Lake watershed nutrient model and the Big Bear Lake in-lake nutrient model as described in Task 6A of the BBL TMDL. The plan and schedule must take into consideration additional data and information that are or will be generated from the required TMDL monitoring programs as described in c and d above. The final plan shall be implemented in accordance with the approved schedule.

g. No later than April 15, 2010, the Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force shall submit for approval a proposed plan and schedule for in-lake sediment nutrient reduction for Big Bear Lake as described in Task 6B of the BBL TMDL. The proposed plan shall include an evaluation of the applicability and feasibility of various in-lake treatment technologies to support development of a long-term strategy for control of nutrients from the sediment. The submittal shall also contain a proposed sediment nutrient monitoring program to evaluate the effectiveness of any strategies implemented. The final plan shall be implemented in accordance with the approved schedule.

h. The plans submitted in e, f, and g above comprise Task 6 of the BBL TMDL -the Big Bear Lake - Lake Management Plan. In addition, the plans submitted in e, f, and g above also must also address the following, either individually or holistically:

1. The plan shall be based on identified and acceptable goals for lake capacity, biological resources and recreational opportunities. Acceptable goals shall be identified in coordination with Regional Board staff and other responsible agencies, including the California Department of Fish and Game and the U.S. Fish and Wildlife Service.

2. The plan shall include a proposed plan and schedule for the development of biocriteria for Big Bear Lake. This is intended to complement Regional Board efforts to develop biocriteria.

3. The plan must identify a scientifically defensible methodology for measuring changes in the capacity of the lake.

4. The proposed plan shall identify recommended short and long-term strategies for control and management of sediment and dissolved and particulate nutrient inputs to the lake to the extent that the permittees are responsible for these inputs over and above that which would occur naturally.

5. The plan shall also integrate the beneficial use map developed pursuant to the Regional Board's March 3, 2005, Clean Water Act Section 401 Water Quality Standards Certification for Big Bear Lake Nutrient/Sediment Remediation Project. The purpose of the

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beneficial use map is to correlate beneficial uses of the lake with lake bottom contours. The map is expected to be used in regulating future lake dredge projects to maximize the restoration and protection of the lake's beneficial uses.

i. The Big Bear Lake - Lake Management Plan shall be implemented upon Regional Board approval. Once approved, the plan shall be reviewed and revised as necessary at least once every three years. The review and revision shall take into account assessments of the efficacy of control/management strategies implemented and relevant requirements of new or revised TMDLs for Big Bear Lake and its watershed. Annual Reports shall be submitted by February 15 of each year.

j. The Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the with the Big Bear TMDL Task Force shall submit an annual report by February 15 of each year summarizing all relevant data from both water quality monitoring programs and the Lake Management Plan as described in c, d, e, f, g, and h above and evaluating compliance with the WLA using the modeling tools developed pursuant to paragraph k, below.

k. Continued compliance with the WLA will be determined by watershed modeling. By March 31, 2010, the Big Bear Lake MS4 Permittees shall submit a final watershed modeling plan that is ready to be implemented and that details how the WLA will be determined and evaluated in future years. Upon approval by the Regional Board, this watershed modeling plan shall be used to determine compliance with the WLA. The Big Bear Lake MS4 Permittees shall select a watershed model that best fits the conditions they are modeling and document the basis for that selection. Data collected under the approved watershed monitoring program shall be evaluated by the Big Bear Lake MS4 Permittees to determine if it falls within the range of dry hydrological conditions as specified in the Nutrient TMDL. The Big Bear Lake MS4 Permittees shall utilize data collected from the monitoring locations specified in the watershed monitoring program approved on May 22, 2009, as well as any other data that are deemed necessary to calibrate and validate the watershed model. The Big Bear Lake MS4 Permittees will document the basis for the selection of the model, the data evaluation and selection process, and the model calibration/validation process. The Big Bear Lake MS4 Permittees or the Big Bear Lake Task Force, shall provide the results of the first model update by February 15, 2011.

l. The Big Bear Lake MS4 Permittees shall revise the Municipal Storm Water Management Plan (MSWMP), Water Quality Management Plan (WQMP) and Local Implementation Plans (LIP) as necessary to implement the plans submitted pursuant to paragraphs c, d, e, f, and g of this section no later than 180 days after the Regional Board approves these plans. A summary of any such revisions shall be included in the area-wide annual report due November 15 of each year.

m. If water quality monitoring data and related modeling analyses indicate that the urban wasteload allocation for total phosphorus is being exceeded during dry hydrological conditions

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despite implementation of the lake management plan and the MSWMP and other requirements of this Order, the Big Bear Lake MS4 Permittees shall comply with the following procedure:

1. Each Big Bear Lake MS4 Permittee upstream of the monitoring locations where exceedances appear to be occurring shall evaluate and characterize discharges from its significant outfall locations.

2. The Big Bear Lake MS4 Permittees shall submit a report with proposed actions to the Executive Officer that describes the BMPs that are currently being implemented and any additional BMPs that will be implemented to reduce the controllable sources of phosphorus causing the exceedances of the urban wasteload allocation for total phosphorus. The report must be submitted as part of the annual report due in November 15 of each year.

n. Storm Water Program Modification: The Big Bear Lake MS4 Permittees shall revise their LIPs, as needed, to incorporate the requirements from TMDL implementation activities. These revisions shall include: (1) the results of the nutrient monitoring programs; (2) an evaluation of the effectiveness of the control measures in meeting the phosphorus WLAs; (3) any additional control measures proposed to be implemented if the WLA or numeric targets are exceeded, including control measures for controlling nutrient inputs from new developments and/or new sources; and (4) a progress report evaluating progress towards meeting the WLAs (pre-compliance evaluation monitoring).[footnote omitted]

5. Knickerbocker Creek Sole Source Pathogen Investigation and Control

a. The City of Big Bear Lake shall continue to participate in and implement the January 2008 Phase 2 Monitoring and Reporting Program in accordance with the agreed sampling locations, parameters, schedule, and protocol.

b. The City of Big Bear Lake shall annually review and revise, if necessary, the control measures implemented and undertake an iterative approach until water quality objectives within Knickerbocker Creek are attained, unless it can be demonstrated that the pathogen sources are from uncontrollable sources.

6. Big Bear Lake Mercury TMDL

Pending adoption of the Mercury TMDL, the City of Big Bear Lake shall participate in the development and implementation of monitoring programs and control measures, including any BMPs that the City is currently implementing or proposing to implement.

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ATTACHMENT 2 – Provisions in Section X of 2010 Permit

A.3 The municipal inspection program activities shall be documented in an electronic database. The database system must include relevant information on ownership, Standard Industrial Classification (SIC) codes, General Permit Waste Discharge Identification (WDID) number (if any), size, Geographic Information System (GIS) data in NAD83/WGS84 compatible formatting with latitude/longitude in decimal degrees, and other pertinent details describing the nature of activities at the site. The information shall be maintained in the MS4 Solution Database or equivalent internet accessible database. In addition to the facility information, the inspection information shall include: date of inspection; inspectors and facility personnel present; site conditions, any observed non-compliance; enforcement actions and/or corrective actions required and schedules for corrective actions; and date of full compliance. The database shall be updated at least once each year and an electronic copy provided to the Regional Board with each annual report. [footnote omitted]

A.7 The Permittees shall verify during inspections and/or prior to local permit issuance whether a site has obtained necessary permit coverage under one or more of the Statewide General Permits, an individual NPDES permit, Waste Discharge requirements, and/or 401 Certification. Local permits, certificates of occupancy, or other approvals shall not be granted until proof of coverage under the applicable statewide permit is verified.

A.8 The Permittees shall deem facilities operating without a proper permit to be in significant non-compliance. Appropriate enforcement measures shall be implemented including a time schedule to obtain coverage or suspension of business license until evidence of permit coverage is provided. Non-filers shall be reported within 14 calendar days to the Regional Board by electronic mail or other written means. The Permittees shall include in their LIP the method for verification of permit coverage and for notification of non-filers to the Regional Board.

A.9 Permittees shall maintain hard or electronic copies and make available upon request all information related to their inspections, including inspection reports, photographs, videotapes, enforcement actions, notices of correction issued to dischargers and other relevant information. This information shall be linked to the electronic database identified in Section X.A.3 above.

B3. [relevant portions]Inspections of construction sites shall include, but not be limited to:

a. Verification of coverage under the General Construction Permit (Notice of Intent (NOI) or Waste Discharge Identification No.) during the initial inspection. Permit coverage shall also be confirmed in the event of a change in ownership.

b. A review of the Erosion and Sediment Control Plans (ESCP) to ensure that the BMPs implemented on-site are consistent with the appropriate phase of construction (Preliminary Stage, Mass Grading Stage, Streets and Utilities Stage, Vertical Construction Stage, and Post-Construction Stage).

c. Visual observations for non-storm water discharges, potential illicit connections, and potential pollutant sources.

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d. Determination of compliance with local ordinances, permits, Water Quality Management Plans and other requirements, including the implementation and maintenance of BMPs required under local requirements.

e. An assessment of the effectiveness of BMPs implemented at the site and the need for any additional BMPs. In evaluating BMP effectiveness, the Permittees may consider applicable action levels (AL) and/or numeric effluent limits (NEL) promulgated by the State or USEPA.

C.4. Each Permittee shall require industrial facilities to implement source control and pollution prevention measures consistent with the BMP Fact Sheets developed by the Permittees.

D.1 [relevant portions] All of the following types of commercial facilities are deemed to have a reasonable potential to discharge pollutants to the MS4s. These types of facilities shall be included in the database identified in Section X.A.3. Commercial facilities may include, but may not be limited to[1]*:*

a. Transport, storage or transfer of pre-production plastic pellets;

d. Automobile impound and storage services;

e. Airplane repair, maintenance, fueling or cleaning;

f. Marinas and boat repair, maintenance, fueling or cleaning;

g. Equipment repair, maintenance, fueling or cleaning;

h. Pest control service facilities;

i. Eating or drinking establishments, including food markets and restaurants;

j. Cement mixing, concrete cutting, masonry facilities;

k. Building materials retailers and storage facilities;

l. Portable sanitary service facilities;

n. Animal facilities such as petting zoos and boarding and training facilities;

o. [relevant portion] botanical or zoological gardens;

r. Golf courses, parks and other recreational areas/facilities;

D.2. The Permittees shall continue to develop BMPs applicable for each of the commercial operations described above.

D.4. [relevant portion] At a minimum, each facility shall be required to implement source control and pollution prevention measures consistent with the BMP Fact Sheets developed by the Permittees.

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[1] Mobile cleaning services are addressed in X.D.6 and 7, below.

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D.6. Within 36 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, shall notify all mobile businesses operating within the Permit area regarding the minimum source control and pollution prevention measures that they must develop and implement. For purposes of this Order, mobile businesses include: mobile auto washing/detailing; equipment washing/cleaning; carpet, drape, and furniture cleaning; and mobile high pressure or steam cleaning. The mobile businesses shall be required to implement appropriate control measures within 3 months of being notified of the requirements.

D.7. Within 36 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, shall develop an enforcement strategy to address mobile businesses. Each Permittee shall also distribute the BMP Fact Sheets to the mobile businesses identified for notification as required in Section X.D.6, above. At a minimum, the mobile business Fact Sheets/training program should include: laws and regulations dealing with urban runoff and discharges to storm drains; appropriate BMPs and proper procedure for disposing of wastes generated from each mobile business.

E.1 Within 36 months of adoption of this Order, each Permittee shall, consistent with the MEP standard, develop and implement a residential program designed to reduce the discharge of pollutants from residential facilities to the MS4s and to prevent discharges from the MS4s from causing or contributing to exceedances of water quality standards in the receiving waters.

E.2 The Permittees shall identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets/BMPs. At a minimum, this should include: residential auto washing and maintenance activities; use and disposal of pesticides, herbicides, fertilizers and house cleaners; and collection and disposal of pet wastes. The Permittees shall encourage residents to implement pollution prevention measures. The Permittees should work with sub-watershed groups to disseminate the latest research information from organizations such as the Inland Empire Resource Conservation District, The Land Trust Alliance, The USDA Natural Resources Conservation Service, USDA's Backyard Conservation Program, and others. [footnotes omitted]

E.5 The Permittees shall develop and implement control measures for common interest areas and areas managed by homeowners associations or management companies. This may include development and promotion of public education materials identifying BMPs for these common interest areas or HOA areas. The Permittees should evaluate the applicability of programs such as the Landscape Performance Certification Program to encourage efficient waster use and to minimize runoff. [footnotes omitted]

E.7 Each Permittee shall include an evaluation of its Residential Program in the annual report starting with the first annual report after adoption of this Order.

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ATTACHMENT 3 – Provisions of Section XI of 2010 Permit

A.7. Each Permittee shall ensure that appropriate control measures to reduce erosion and maintain stream geomorphology are included in the design for replacement of existing culverts or construction of new culverts and/or bridge crossing.

A.9 Each Permittee shall participate in the development of the Watershed Action Plan, described in Section B below, to integrate water quality, stream protection and stormwater management and re-use within the permitted area with land use planning policies, ordinances, and plans, as applicable, and consistent with the MEP standard.

B. Watershed Action Plan

1. The Permittees shall develop an integrated watershed management approach to improve integration of planning and approval processes with water quality and quantity control measures. Management of the water quality and hydrologic impacts of urbanization will be more effective whether managed on a per site, sub-regional or regional basis, if coordinated with the Watershed Action Plan. Pending completion of the Watershed Action Plan, management of the impacts of urbanization shall be accomplished using existing programs.

2. Within twelve months of adoption of this Order, each Permittee shall review the watershed protection principles and policies, specifically addressing urban and storm water runoff, in its planning procedures, including CEQA preparation, review and approval processes; General Plan and related documents including, but not limited to its Development Standards, Zoning Codes, Conditions of Approval, Development Project Guidance; and WQMP development and approval processes.

3. The Principal Permittee, in collaboration with the Co-Permittees, shall develop a Watershed Action Plan (WAP) that describes and implements the Permittees' approach to coordinated watershed management. The WAP shall improve coordination of existing programs and identify new and/or enhanced program elements as applicable. The objective of the WAP is to improve integration of water quality, stream protection, storm water management, water conservation and re-use, and flood protection, with land use planning and development processes. The WAP shall be developed in two phases:

a. Phase 1: within 12 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees shall:

i. Identify program-specific objectives for the WAP; the objectives will include consideration of:

1. The watershed protection principles specified in Section XI.C.2.a-g, below;

2. The Permittee's planning and procedure review required in XI.B.2, above;

3. Potential impediments to implementing watershed protection principles during the planning and development processes, including but not limited to LID principles and management of the impacts of hydromodification;

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4. Impaired waters [CWA § 303(d) listed] with and without approved TMDLs, pollutants causing impairment, monitoring programs for these pollutants, control measures, including any BMPs that the Permittees are currently implementing, and any BMPs the Permittees are proposing to implement. In addition, if a TMDL has been developed and an implementation plan is yet to be developed, the WAP shall specify that the responsible Permittees should develop constituent-specific source control measures, conduct additional monitoring and/or cooperate with the development of an implementation plan, where feasible and consistent with the MEP standard.

ii. Develop a structure for the WAP that emphasizes coordination of watershed priorities with the Permittees' LIPs via the areawide model LIP;

iii. Identify linkages between the WAP and the SWQSTF, MSWMP, WQMP, the implementation of LID, and the TMDL Implementation Plans;

iv. Identify other relevant existing watershed efforts (Chino Basin Master Plan, SAWPA's IRWMP, etc., and their role in the WAP;

v. Ensure that the HCOC Map/Watershed Geodatabase is available to watershed stakeholders via the World Wide Web, and has incorporated the following information:

1. Delineation of existing unarmored or soft-armored drainages in the permitted area that are vulnerable to geomorphological changes due to hydromodification and those channels and streams that are engineered, hardened, and maintained.

2. GIS layers for known sensitive species, protected habitat areas, drainage boundaries, and potential storm water recharge areas and/or reservoirs;

3. 303(d)-listed waterbodies and associated pollutants;

4. Available and relevant regulatory and technical documents accessible via hyperlinks;

vi. Develop a schedule and procedure for maintaining the Watershed Geodatabase, and develop a draft schedule for expected enhancements to increase functionality;

vii. Review the Watershed Geodatabase with Regional Board staff from the Storm Water, TMDL, and Watershed Planning/Program Sections, and other resource agencies, to verify attributes of the Geodatabase, including drainage feature stability/susceptibility/risk assessments, and the intended use of the Geodatabase to support regulatory processes such as WQMP approvals, Clean Water Act Section 401 Water Quality Standards Certifications (401 Certifications), and LID BMP feasibility evaluations;

viii. Identify potential causes of identified stream degradation including a consideration of sediment yield and balance on a watershed or subwatershed basis.

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ix. Conduct a system-wide evaluation to identify opportunities to retrofit existing storm water conveyance systems, parks, and other recreational areas with water quality protection measures, and develop recommendations for specific retrofit studies that incorporates opportunities for addressing applicable TMDL implementations plans, hydromodification management, and/or LID implementation within the permitted area.[footnote omitted]

x. Conduct a system wide evaluation to identify opportunities for joint or coordinated development planning to address stream segments vulnerable to hydromodification and coordinated re-development planning to identify restoration opportunities for hardened and engineered streams and channels. The WAP shall identify contributing jurisdictions and the stream segments that will benefit from this coordination.

xi. Invite participation and comments from resources conservation districts, water and utility agencies, state and federal agencies, non-governmental agencies and other interested parties in the development and use of the Watershed Geodatabase;

xii. Submit the Phase 1 components in a report to the Executive Officer for approval. The Report shall be deemed acceptable to the Regional Board if the Executive Officer submitted raises no written objections within 30 days of submittal.

b. Phase 2: within 12 months of the approval by the Executive Officer of the Report from Phase 1, above, the Principal Permittee, in coordination with the Co-Permittees, shall:

i. Contingent upon consensus with Regional Board staff and other resource agencies as described in XI.B.3.a.vii, above, specify procedures and a schedule to integrate the use of the Watershed Geodatabase into the implementation of the MSWMP, WQMP, and TMDLs;

ii. Develop and implement a Hydromodification Monitoring Plan (HMP) to evaluate hydromodification impacts for the drainage channels deemed most susceptible to degradation. The HMP will identify sites to be monitored, include an assessment methodology, and required follow-up actions based on monitoring results. Where applicable, monitoring sites may be used to evaluate the effectiveness of BMPs in preventing or reducing impacts from hydromodification.

iii. Develop and implement a Hydromodification Management Plan prioritized based on drainage feature/susceptibility/risk assessments and opportunities for restoration.

iv. Conduct training workshops in the use of the Watershed Geodatabase. Each Permittee must ensure that their planning and engineering staff attend a workshop.

v. Conduct demonstration workshops for the Watershed Geodatabase to be attended by appropriate upper-level managers and directors from each Permittee.

vi. Develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs. The recommendations should include information needed to be submitted to the Regional Board for approval of regional treatment control BMPs. At a minimum, this information should include: BMP location; type and effectiveness in removing pollutants of concern; projects tributary to the regional treatment system; engineering design

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details; funding sources for construction, operation and maintenance; and parties responsible for monitoring effectiveness, operation and maintenance. The Permittees are encouraged to collaborate and work with other counties to facilitate and coordinate these recommendations.

vii. Implement applicable retrofit or regional treatment recommendations from the evaluation conducted in Section B.3.a.ix, above.

viii.Submit the Phase 2 components in a report to the Executive Officer. The submitted report shall be deemed acceptable to the Regional Board if the Executive Officer raises no written objections within 30 days of submittal.

4. Within three years of adoption of this Order, each Permittee shall review the watershed protection principles and policies in its General Plan or related documents (such as Development Standards, Zoning Codes, Conditions of Approval, Development Project Guidance) to determine consistency with the Watershed Action Plan. Each Permittee shall report the findings in the annual report along with a schedule for any necessary revision.

C.1. Within 24 months of adoption of this Order, each Co-Permittee shall review its General Plan and related documents including, but not limited to its development standards, zoning codes, conditions of approval and development project guidance to eliminate any barriers to implementation of the LID principles and HCOC discussed in Section XII.E of this Order. The results of this review along with any proposed action plans and schedules shall be reported in the Annual report for the corresponding reporting year. Any changes to the project approval process or procedures shall be reflected in the LIP.

D.2. Within 18 months of adoption of this Order, the Principal Permittee shall coordinate the revision of the WQMP Guidance and Template to include new elements required under this Order.

E. Low Impact Development (LID) And Hydromodification Management to Minimize Impacts from New Development/Significant Redevelopment

The objective of LID is to mimic pre-development site hydrology through technically and economically feasible source control and site design techniques. LID combines hydrologically functional site design with pollution prevention methods to compensate for land development impact on hydrology and water quality.

1. Within 18 months of adoption of this Order, each Permittee shall evaluate any potential barriers to implementing LID principles. This shall be done in conjunction with the requirements specified under Sections XI.B.3.a and XI.C.3. To facilitate implementation of LID BMPs, the Permittees should consider revising their ordinances, codes and building and landscape design standards. The Permittees shall promote green infrastructure/LID BMP implementation and identify the applicable LID principles in the project specific WQMP:

a. Landscape designs that promote water retention and evapotranspiration such as 1 foot depth of compost/top soil in commercial and residential areas on top of 1 foot of decompacted

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subsoil, concave landscape grading to allow runoff from impervious surfaces, and water conservation by selecting native plants, weather-based irrigation controllers, etc.

b. Allow permeable surface designs in low traffic roads and parking lots, where feasible. This may require land use/building code amendment.

c. Allow natural drainage systems for street construction and catchments (with no drainage pipes) and allow grassy swales and ditches where feasible.

d. Require parking lots to drain to landscaped areas to provide treatment, retention or infiltration, where feasible.

e. Reduce curb requirements, where feasible, where adequate drainage, conveyance, treatment and storage are available.

f. Amend where feasible and practicable, land use/building codes to allow streets with no curbs and parking lots with no stop blocks to allow storm water to drain into landscaped areas.

g. Require, where feasible, rainwater harvesting and use.

h. Consider building narrow streets, alternatives to minimum parking requirements, etc.

i. Consider vegetated landscape as an integral element of streets, parking lots, playground and buildings as a storm water retention and retention system.

j. Consider and facilitate application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss such as hillside development projects, [footnote omitted]

k. Consider other site design BMPs identified in the WQMP Guidance and Template and not included above.

. . .

3. To reduce pollutants in urban runoff, address hydromodification, and manage storm water as a resource to the maximum extent practicable, WQMPs shall specify preferential use of site design BMPs that incorporate LID techniques in the following manner (from highest to the lowest priority): 1)Preventative measures (these are mostly non-structural measures, e.g., preservation of natural features to a level consistent with the maximum extent practicable standard; minimization of runoff through clustering, reducing impervious areas, etc.) and (2) Mitigative measures (these are structural measures, such as, infiltration, harvesting and use, bio-treatment, etc.). The mitigative or structural site design BMPs shall also be prioritized (from highest to lowest priority): (1) Infiltration BMPs (examples include permeable pavement with infiltration beds, dry wells, infiltration trenches, surface and sub-surface infiltration basins. The Permittees should work with local groundwater management agencies to ensure that infiltration Treatment Control BMPs are designed appropriately; (2) BMPs that harvest and use (e.g., cisterns and rain barrels); and (3) Vegetated BMPs that promote evapotranspiration including bioretention, biofiltration and bio-treatment.

4. The Permittees shall reflect in the Water Quality Management Plan Guidance and Template and require each priority development project to infiltrate, harvest and use, evapotranspire

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and/or bio-treat[2] the 85th percentile storm event ("design capture volume"), as specified in Section Xi.D.6 above. Any portion of the design capture volume that is not infiltrated, harvested and used, evapotranspired, and/or bio-treated onsite by LID BMPs shall be treated and discharged in accordance with the requirements set forth in Section XI.E.10 and/or Section XI.G, below. [footnote omitted]

5. Within 18 months of adoption of this Order, the Permittees shall review and update the Water Quality Management Plan Guidance and Template to incorporate LID principles (where feasible) and to address the impact of urbanization on downstream hydrology. At a minimum, the following elements shall be included during the update:

a. Site Design BMPs:

i. Review and update the menu of site design BMPs to include any LID BMP that is currently not listed.

ii. Include as a reference for design and installation of LID BMPs the LID Guidance Manual for Southern California developed by the Southern California Coastal Water Research Project upon its completion.

iii. Techniques or specifications to minimize soil compaction in areas designated for site design BMPs, especially infiltration.

iv. Review and update design, installation and test specifications for retention BMPs to prevent unwanted ponding.

v. Evaluate the use of a credit system for using site design BMPs.[footnote omitted]

vi. Develop in-lieu programs for projects where implementation may not be feasible.

b. Source Control BMPs:

i. Review and update the menu of source control BMPs.

ii. Include design and installation standards for each structural source control BMP.

c. Treatment Control BMPs:

i. Update the list of treatment control BMPs, including an evaluation of their effectiveness based on national, statewide or regional studies.

ii. Prioritize treatment control BMPs based on their effectiveness in pollutant removal and require project proponents to select the most appropriate BMPs.

iii. Include design and installation standards for each treatment control BMP.

d. Hydrologic Condition of Concern (HCOC):

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[2] A properly engineered and maintained bio-treatment system may be considered only if infiltration, harvesting and use and evapotranspiration cannot be feasibly implemented at a project site (feasibility criteria will be established in the WQMP [Section XI.E.7]. Specific design, operation and maintenance criteria for bio-treatment systems shall be part of the model WQMP that will be produced by the permittees.

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i.The Permittees shall continue to ensure, consistent with the MEP standard, through their review and approval of project-specific WQMPs that new development and significant redevelopment projects:

a) do not pose a hydrologic condition of concern (HCOC), or

b) otherwise, demonstrate that the project does not have the potential to cause significant adverse impacts on downstream natural channels and habitat integrity, alone or in conjunction with the impacts of other projects likely to be implemented in the same drainage area.

ii. A development/redevelopment project does not cause a HCOC if it causes no adverse downstream impacts on the physical structure aquatic, and riparian habitat and any of the following conditions is met:

a) The project disturbs less than one acre and is not part of a common plan of development.

b) the post-development site hydrology (including runoff volume, velocity, duration, time of concentration[3]), is not significantly different from pre-development hydrology for a 2-year return frequency storm. A difference of 5% or less is considered insignificant.

c) All downstream conveyance channels that will receive runoff from the project are engineered, hardened and regularly maintained to ensure design flow capacity, and no sensitive stream habitat areas will be affected. This exemption is only applicable to conveyance channels that have received regulatory approvals prior to June 1, 2004, including CEQA review and approvals by US Army Corps of Engineers, Regional Board, and California Department of Fish and Game.

iv. If a project causes a HCOC, and a Watershed Action Plan has not been approved, the WQMP shall specify one of the following:

a) Verify the project's potential to cause significant adverse impacts by conducting a further evaluation of the projects impact on stream geomorphology and/or aquatic habitat. This evaluation should include consideration of pre- and post-development hydrograph volumes, time of concentration and peak discharge velocities for a 2 year storm event, consideration of sediment budgets, and a sediment transport analysis. If this evaluation confirms the project's potential to cause significant adverse downstream impacts on downstream natural channels and habitat integrity, alone or in conjunction with impacts of other projects, then the project shall satisfy items b), c), d), e), or f), below. If the evaluation indicates minimal impact on stream channels and habitats, no further action is required:

b) Require additional onsite or offsite mitigation to reduce potential erosion or impacts to aquatic habitats by using LID BMPs, where feasible, or other control measures.

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[3] Time of concentration is defined as the time after the beginning of rainfall when all portions of the drainage basin are contributing simultaneously to flow at the outlet.

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c) Require in-stream controls[4] to mitigate the impacts on downstream natural channels and habitat integrity. The project proponent should first consider site design controls and on-site controls prior to proposing in-stream controls; in-stream controls must not adversely impact beneficial uses or result in sustained degradation of water quality of the receiving waters and shall require all necessary regulatory approvals.[5]

d) Mitigate the HCOC through implementation of the approved Watershed Action Plan.

e) If site conditions do not permit b), c), or d) above, the alternatives and in-lieu programs discussed in the LIP, may be considered.

6. The WQMP shall specify methods for determining time of concentration.

7. A feasibility analysis that includes technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID.

i. The feasibility analysis shall include a groundwater protection assessment to determine if structural infiltration BMPs are appropriate for the site

8. Integrate Watershed Action Plan and TMDL Implementation Plans into project-specific WQMPs in affected watersheds.

9. Within 18 months of adoption of this Order, a copy of the updated WQMP Guidance and Template shall be submitted for review and approval by the Executive Officer. The Permittees shall implement the updated WQMP Guidance and Template within 90 days of approval. If the Executive Officer has not approved the WQMP Guidance and Template within 18 months of adoption of this Order, either the Permittees shall require implementation of LID BMPs, or determine infeasibility of LID BMPs for each project through a project-specific analysis, each of which shall be submitted to the Executive Officer, at least 30 days prior to Permittee approval. Such feasibility determinations shall be certified by a Professional Civil Engineer registered in the State of California, and will be documented in the project WQMP, which shall be approved by the Permittee prior to submittal to the Executive Officer. Within 30 days of submittal to the Executive Officer, the Permittee will be notified if the Executive Officer intends to take any action. Once the updated WQMP Guidance and Template has been approved by the Executive Officer, the submittal of feasibility determinations to the Executive Officer is no longer required.

10. If site conditions do not permit infiltration, harvesting and use, and/or evapotranspiration, and/or bio-treatment of the design capture volume at the project site as close to the source as possible, the alternatives a), b), and c), below, and the credits and in-lieu programs discussed under Section G, below, may be considered and implemented:

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[4] In-stream measures involve modifying the receiving stream channel slope and geometry so that the stream can convey the new flow regime within increasing the potential for erosion and aggradation. In-stream measures are intended to improve long-term channel stability and prevent erosion by reducing the erosive forces imposed on the channel boundary.

[5] In-stream control projects require a Streambed Alteration Agreement from the California Department of Fish & Game, a CWA section 404 permit from the U.S. Army Corps of Engineers, and a section 401 certification from the Water Board. Early discussions with these agencies on the acceptability of an in-stream modification are necessary to avoid project delays or redesign.

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a. Implement LID principles to the MEP at the project site close to the point of storm water generation and infiltrate and/or harvest and re-use at least the design capture volume through designated infiltration/treatment areas elsewhere within the project site.

b. Implement LID on a sub-regional basis. For example, at a 100 unit high density housing unit with a small strip mall and a school: connect all roof drains to vegetated areas (if there are any vegetated areas, otherwise storm water storage and use may be considered or else divert to the local storm water conveyance system, to be conveyed to the local treatment system), construct a storm water infiltration gallery below the school playground to infiltrate and/or harvest and re-use the design capture volume.

c. Implement LID on a regional basis. For example, several development could propose a regional system to address storm water runoff from all the participating developments.

d. For alternatives a), b), and c) above, the pervious areas to which the runoff from the impervious areas are connected should have the capacity to infiltrate, harvest and use, evapotranspire and/or bio-treat at least the design capture volume from the entire tributary area.

F. Road Projects

1. Within 24 months of adoption of this Order, the Principal Permittee, in cooperation with the Co-Permittees, shall develop standard design and post-development BMP guidance to be incorporated into projects for public streets, roads, highways, and freeway improvements, to reduce the discharge of pollutants from the projects to the MEP. The draft guidance shall be submitted to the Executive Officer for review and approval and shall meet the performance standards for site design/LID BMPs, source control and treatment control BMPs as well as the HCOC criteria. The guidance and BMPs shall address any paved surface used for transportation of automobiles, trucks, motorcycles, and other vehicles, and excludes routine road maintenance activities where the surface footprint is not increased. The guidance shall incorporate principles contained in the USEPA guidance. "Managing Wet Weather with Green Infrastructure: Green Streets" to the maximum extent practicable and at a minimum shall include the following:

a. Guidance specific to new road projects;

b. Guidance specific to projects for existing roads;

c. Size or impervious area criteria that trigger project coverage;

d. Preference for green infrastructure approaches wherever feasible;

e. Criteria for design and BMP feasibility analysis on a project-specific basis.

2. Within six months of approval by the Executive Officer, the Permittees shall implement the standard design and post-development BMP guidance for all municipal road projects.

3. Pending approval of the standard design and post-development BMP Guidance, Permittees shall require site-specific WQMPs for streets road and highway projects consistent with Section XI.D.4 of this Order.

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I. Field Verification of BMPs

2. In addition, post-construction BMPs shall be inspected, prior to the rainy season, within three years after project completion and every three years thereafter. The Permittees shall verify, through visual observation, that the BMPs are properly maintained, operating, and are functional. Results of the inspections shall be reported in the Annual Report.

J. Change of Ownership and Recordation

1. The Permittees shall establish a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs to ensure that they are properly recorded in public records at the County and/or City and the information is conveyed to all appropriate parties when there is a change in project or site ownership.

2. The Permittees shall maintain a database to track all structural treatment control BMPs, including the location of BMPs, parties responsible for construction, operation and maintenance.

K. Operation and Maintenance of Post-construction BMPs

1. [relevant portions] The Permittees shall ensure, to the MEP, that all post-construction BMPs continue to operate as designed and implemented with control measures necessary to effectively minimize the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, flies, etc. . . . Permittees shall, . . . during inspections, ensure proper maintenance and operation of all permanent structural post-construction BMPs installed in new developments.

2. Within twelve months of adoption of this Order, the Permittees shall develop a database to track operation and maintenance of post-construction BMPs. The database should include available BMP information such as the type of BMP design, location of BMPs (latitude and longitude), date of construction, party responsible for maintenance, maintenance frequency, source of funding for operation and maintenance, maintenance verification, and any problems identified during inspection including any vector or nuisance problems. A copy of this database shall be submitted with the annual report.

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SECTION 6

DECLARATIONS OF CLAIMANTS

In Support of Joint Test Claims of San Bernardino County Local Agencies Concerning Santa Ana RWQCB Order No. R8-2010-0036

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DECLARATION OF GIA KIM

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT

I, GIA KIM, hereby declare and state as follows:

1. I am Chief of the Land Development Division and the National Pollutant Discharge Elimination System section for the Department of Public Works for the County of San Bernardino. Department of Public Works personnel conduct the activities of the San Bernardino County Flood Control District ("District"), including under California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit"). In that capacity, I share responsibility for the compliance of the District with regard to the requirements of the Permit as they apply to the District.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the District's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the District and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

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6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the District, to undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the District, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a District-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the District for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the District in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the District to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the District for the development of the individual District LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the District, to evaluate 15 specified categories of discharges

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that are authorized for discharge into the permittees' MS4, including that of the District, to determine whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential follow-up investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the District, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees, including the District, to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The District is listed as a "Big Bear Lake MS4 Permittee" under the Permit. In addition, because all TMDL-related programs are funded jointly through the Implementation Agreement, the District also is responsible for a share of costs relating to the MSAR TMDL, Knickerbocker Creek and potential mercury TMDL requirements.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial

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indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL MS4 Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to

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submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the District, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the District, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This

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requirement involves the development, drafting and necessary passage of District ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the ordinances. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the District, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the District, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the District, through the Implementation Agreement. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees. Additionally, the District, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the District has

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exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees through joint activities funded through the Implementation Agreement. Individual permittees will be required to update the database as systems are added or removed from their jurisdictions. The District is paying its share of the cost of this effort through the Implementation Agreement. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the District, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs;

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requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b. and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase

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1, identifying program-specific objectives for the WAP; developing a structure for the WAP; identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the District, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection

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principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the District, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project

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through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

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xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the District, through the Implementation Agreement. Each permittee, including the District, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the District, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the District, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the District. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the District has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the District, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities

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m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the District, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water

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7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The District has the ability to impose inspection fees for commercial and industrial facilities located on District property; however, District does not have the ability to impose inspection fees for commercial and industrial facilities located outside of District property. I am not aware of any other fee or tax that the District would have the discretion to impose under California law to recover any portion of the cost of the programs and activities set forth in this declaration. I further am informed and believe that the only available source for the District to pay for these new programs and activities is the District's general operating fund.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 30, 2011, at San Bernardino, California.

Gia Kim

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DECLARATION OF GIA KIM

COUNTY OF SAN BERNARDINO

I, GIA KIM, hereby declare and state as follows:

1. I am Chief of the Land Development Division and National Pollutant Discharge Elimination System section for the Department of Public Works for the County of San Bernardino ("County"). In that capacity, I share responsibility for the compliance of the County with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the County.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the County's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the County and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the County, to

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undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the County, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a County-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the County for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the County pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the County to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the County for the development of the individual County LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the County, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the County, to

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determine whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the County, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees, including the County, to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The County is listed as a "MSAR Permittee" and a "Big Bear Lake MS4 Permittee" under the Permit. In addition, because all TMDL-related programs are funded jointly through the Implementation Agreement, the County also is responsible for a share of costs relating to the Knickerbocker Creek and potential mercury TMDL requirements.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive

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Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL MS4 Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm

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Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the County, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the County, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of County ordinances to

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address such wastes, as well the development of an enforcement strategy and the enforcement of the ordinances. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the County, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the County, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the County, through the Implementation Agreement and also by the County individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the County. Additionally, the District and the County, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in

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FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the County, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the County, through joint activities funded through the Implementation Agreement. Individual permittees, including the County, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the County, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the County include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or

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need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b. and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and

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implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP; identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the County, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the

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RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring

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implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

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xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the County, through the Implementation Agreement. Each permittee, including the County, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the County has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the County, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water

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7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The County imposes review fees associated with new development within its jurisdiction. Such development fees do not, on information and belief, fully cover the requirements related to new development or other requirements of the Permit set forth herein. I am not aware of any other fee or tax that the County would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I

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further am informed and believe that the only available source to for the County to pay for these new programs and activities is the County's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 30, 2011, at San Bernardino, California.

Gia Kim

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DECLARATION OF DAVID LAWRENCE

CITY OF BIG BEAR LAKE

I, David Lawrence, hereby declare and state as follows:

1. I am Director of Public Works/City Engineer for the City of Big Bear Lake ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

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undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

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whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is also identified as a "Big Bear Lake MS4 Permittee" in the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

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treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL MS4 Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

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LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

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ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the City, through joint activities funded through the Implementation Agreement. Individual permittees, including the City, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of

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several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

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identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

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WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

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conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

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xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and

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inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

k. **Training Requirements**: Section XVI of the Permit requires the permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training. All of these requirements are funded by the permittees, including the City. The permittees, including the City, are required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the Permit and to provide

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such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

l. **Reporting of Non-Compliant Facilities**: Section XVII.D of the Permit requires the permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to specified set of requirements. Permittees, including the City, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act ("CWA") Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements require the permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

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outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only available source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 28, 2011, at Big Bear Lake, California.

David Lawrence PE

DECLARATION OF DON ALLINDER

CITY OF CHINO

I, DON ALLINDER, hereby declare and state as follows:

1. I am Environmental Coordinator for the City of Chino ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FYs") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is listed as a "MSAR Permittee" under the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. <u>Promulgation and Implementation of Ordinance to Address Bacteria Sources</u>: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the City, with septic systems in their jursidictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the City, through joint activities funded through the Implementation Agreement. Individual permittees, including the City, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of

several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b. and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and

inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

k. **Training Requirements**: Section XVI of the Permit requires the permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training. All of these requirements are funded by the permittees, including the City. The permittees, including the City, are required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the Permit and to provide

such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

l. **Reporting of Non-Compliant Facilities**: Section XVII.D of the Permit requires the permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to specified set of requirements. Permittees, including the City, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act ("CWA") Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements require the permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City imposes a fee related to the inspection of industrial and commercial facilities. This fee does not, however, recover the entire cost associated with the inspection program. The City also imposes a fee on residential and commercial/industrial property owners for stormdrain use. That fee is designed to fund capital improvement projects. A portion of that fee is used to fund activities under the Permit. Moreover, on information and belief, these funds are not sufficient to cover all requirements of the Permit set forth in this declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only available source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 28, 2011, at Chino, California.

Don Allinder

DECLARATION OF TAD GARRETY

CITY OF CHINO HILLS

I, TAD GARRETY, hereby declare and state as follows:

1. I am NPDES Coordinator for the City of Chino Hills ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is listed as a "MSAR Permittee" under the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and

inspections maintained in a database; to annually evaluate the inspection and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

k. **Training Requirements**: Section XVI of the Permit requires the permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training. All of these requirements are funded by the permittees, including the City. The permittees, including the City, are required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the Permit and to provide

such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

l. **Reporting of Non-Compliant Facilities**: Section XVII.D of the Permit requires the permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to specified set of requirements. Permittees, including the City, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act ("CWA") Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements require the permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City imposes development fees associated with new development within its jurisdiction. Such existing development fees only reimburse the City's costs associated with reviewing various aspects of development projects, including initial and final WQMP review for all development projects requiring such a plan. The existing development fees do not, on information and belief, fully cover the requirements related to new development set forth herein or other requirements in the Permit. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any

portion of the cost of these programs and activities. I further am informed and believe that the only other available source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 29, 2011, at Chino Hills, California.

Tad Garrety

DECLARATION OF AMER JAKHER

CITY OF COLTON

I, AMER JAKHER, hereby declare and state as follows:

1. I am Public Works and Utility Services Director for the City of Colton ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the City, with septic systems in their jursidictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the City, through joint activities funded through the Implementation Agreement. Individual permittees, including the City, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of

several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only available source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 29, 2011, at Colton, California.

Amer Jakher

DECLARATION OF DAN CHADWICK

CITY OF FONTANA

I, DAN CHADWICK, hereby declare and state as follows:

1. I am Public Works Manager for the City of Fontana ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is listed as a "MSAR Permittee" under the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the City, with septic systems in their jursidictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the City, through joint activities funded through the Implementation Agreement. Individual permittees, including the City, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of

several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and

inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

k. **Training Requirements**: Section XVI of the Permit requires the permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training. All of these requirements are funded by the permittees, including the City. The permittees, including the City, are required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the Permit and to provide

such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

l. **Reporting of Non-Compliant Facilities**: Section XVII.D of the Permit requires the permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to specified set of requirements. Permittees, including the City, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act ("CWA") Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements require the permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am aware of that the City has established and collects Stormwater Compliance fees for: Water Quality Management Plan Review and Plan Check; Stormwater Inspection of Commercial and Industrial Sites; Stormwater Reinspections; and Construction Site Inspections. These fees are imposed on applications for new, private development, and inspections of private facilities. They were adopted within the fee limitations of California's Proposition 13 and Proposition 218 and do not cover the cost of general program administration or program development. They provide limited funding for specific program elements. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I

further am informed and believe that the only available source to pay for these new programs and activities other than the above mentioned fees is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June ___, 2011, at Fontana, California.

Dan Chadwick

Received
June 30, 2011
Commission on
State Mandates

DECLARATION OF MELISSA MORGAN

CITY OF HIGHLAND

I, MELISSA MORGAN, hereby declare and state as follows:

1. I am Public Services Manager for the City of Highland ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

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undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

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whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

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treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

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LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

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e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database;

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h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b. and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP; identifying linkages between the WAP and other plans; identifying other relevant watershed

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efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

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WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

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conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

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xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and

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inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

k. **Training Requirements**: Section XVI of the Permit requires the permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training. All of these requirements are funded by the permittees, including the City. The permittees, including the City, are required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the Permit and to provide

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such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

l. **Reporting of Non-Compliant Facilities**: Section XVII.D of the Permit requires the permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to specified set of requirements. Permittees, including the City, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act ("CWA") Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements require the permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City will exceed $1,000 for future FYs during the term of the Permit.

m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

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outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City imposes a fee to cover the cost of inspections of industrial and commercial facilities. I am informed and believe that this fee does not cover the cost of residential programs or other programmatic requirements related to inspections under the Permit. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I am

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further informed and believe that the only other available source to pay for the new programs and activities set forth in this declaration is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 28 2011, at Highland, California.

Melissa Morgan

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DECLARATION OF MICHAEL C. HUDSON

CITY OF MONTCLAIR

I, MICHAEL C. HUDSON, hereby declare and state as follows:

1. I am City Engineer for the City of Montclair ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

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undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

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whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is listed as a "MSAR Permittee" under the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

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treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

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LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

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i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

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identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

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iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

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conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

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outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only available source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 30, 2011, at Montclair, California.

Michael C. Hudson, City Engineer

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DECLARATION OF STEPHEN H. WILSON

CITY OF ONTARIO

I, STEPHEN H. WILSON, hereby declare and state as follows:

1. I am the Environmental Water/Wastewater Engineer for the City of Ontario ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

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undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

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whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is listed as a "MSAR Permittee" under the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

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treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

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LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

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ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the City, through joint activities funded through the Implementation Agreement. Individual permittees, including the City, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of

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several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

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identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistency with the

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WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implementing LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

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vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate as designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

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outcomes and the result of municipal enforcement activities. The results of the assessment are required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City collects a stormwater abatement program fee that covers some portion of Permit compliance activities, including staff time. It is my information and belief that this fee cannot be raised, however, to cover the additional costs set forth in this declaration due to the provisions of Proposition 218. The City also collects a user fee as a function of business license renewal activities. To my information and belief, these fees cover some, but not all costs of inspections of commercial and industrial facilities, but not residential areas, or other inspection-related costs imposed by the Permit. The City also collects fees connected with property development, a portion of which are used for inspecting construction sites. Again, to my information and belief, such fees do not cover all costs imposed

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by the Permit. I further am informed and believe that the only other available source to pay for the new programs and activities set forth in this declaration is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 30, 2011, at Ontario, California.

Stephen H. Wilson

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DECLARATION OF LINDA CEBALLOS

CITY OF RANCHO CUCAMONGA

I, LINDA CEBALLOS, hereby declare and state as follows:

1. I am Environmental Programs Manager for the City of Rancho Cucamonga ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

2. I have reviewed sections of the Permit and the attached Receiving Waters and Urban Runoff Monitoring and reporting Program No. R8-2010-0036 ("MRP") as set forth herein and am familiar with those provisions. I have also reviewed pertinent sections of Order No. R8-2002-0012 ("2002 Permit"), which was issued by the RWQCB in 2002, and am familiar with those provisions.

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and exhibits of the test claim filed by the City and other permittees under the Permit, the specific sections of the Permit at issue in the test claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. Based on my understanding of the Permit, and the requirements of the 2002 Permit, I believe that the Permit requires the permittees covered by it, including the City, to

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undertake the following programs, which represent new programs and/or higher levels of service, activities not required by the 2002 Permit and which are unique to local government entities:

a. **Local Implementation Plan Requirement**: Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, of the Permit require the permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which set forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. The tasks required will include not only creation of individual LIPs, with the identification of personnel, programs and other tasks, but also the review and periodic updating of those LIPs over the course of the Permit and continuing thereafter. Development of the model LIP is being conducted by the San Bernardino County Flood Control District ("District") in part through funding provided by the City pursuant to its obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees under the Permit. The cost of these requirements exceeds $1,000. During Fiscal Years ("FY") 2009-10 and 2010-2011, I am informed and believe that the cost to the City to develop the model LIP exceeded $1,000. I am further informed and believe that the cost to the City for the development of the individual City LIP, including periodic reviews and updates, will exceed $1,000 in succeeding FYs during the term of the Permit.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They are Significant Sources of Pollutants**: Section V.A.16 of the Permit requires the permittees, including the City, to evaluate 15 specified categories of discharges that are authorized for discharge into the permittees' MS4, including that of the City, to determine

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whether such discharges are a significant source of pollutants to the MS4. This task involves monitoring, analysis of samples, evaluation of monitored waters as sources of pollutants, potential followup investigation, reporting to the RWQCB Executive Officer and then either prohibiting the discharge from entering the MS4, authorizing it but requiring source control best management practices ("BMPs") or treatment controls or requiring the source to obtain separate permit coverage. The effort to monitor and assess the discharges is being jointly undertaken by the permittees, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

c. **Incorporation of TMDLs**: Sections V.D.2-6 of the Permit, as well as Sections I.F, V.A.2.a, and V.B.1.b of the MRP require various permittees to participate in various activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. The City is listed as a "MSAR Permittee" under the Permit. Because the permittees, including the City, are jointly funding all TMDL-related activities under the Implementation Agreement, all of these activities also are a new program affecting the City.

i. With respect to the MSAR TMDL, the Permit requires that the MSAR Permittees achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, BMPs, inspection criteria,

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treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis, and that if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL become the final WQBELs for wet weather conditions, unless the RWQCB has adopted alternative final WQBELs;

ii. With respect to the BBL TMDL, the Permit and MRP requires that the BBL TMDL Permittees implement BMPs to attain compliance with the TMDL, even though the permittees are currently in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan to update the existing BBL watershed nutrient model and in-lake nutrient model; to submit a plan for in-lake sediment nutrient reduction; to, with respect to Lake Management Plan (as that term is defined in the Permit) documents required by the Permit, meet various requirements, including relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identifying methodology for measuring changes in lake capacity, recommending short and long-term strategies to control and manage sediment and integrate a beneficial use map development by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to submit a final watershed model to determine WLA compliance; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the

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LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicates that the WLA is being exceeded; and, to revise the LIP to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA.

iii. With respect to Knickerbocker Creek, the Permit requires the City of Big Bear Lake to continue to implement a monitoring and reporting program and to review and revise control measures to address water quality objectives within Knickerbocker Creek unless it can be determined that pathogen sources are from uncontrollable sources.

iv. With respect to a potential TMDL for mercury in BBL, the Permit requires the City of Big Bear Lake to develop and implement monitoring programs and control measures in anticipation of adoption of the BBL mercury TMDL.

v. The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. The cost of this effort exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

d. Promulgation and Implementation of Ordinance to Address Bacteria Sources: Section VII.D of the Permit requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the

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ordinances. No costs have yet been expended by the City with respect to this requirement, but I am informed and believe that the cost of such promulgation and implementation will exceed $1,000 during future FYs during the term of the Permit.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Sections VIII.A and B. of the Permit and Section IV.B.3 of the MRP require that the permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions require permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; aerial photograph to detect IC/IDs; inspection of facilities, sites and MS4; analysis of monitoring data; watershed education regarding illegal discharges; pollution prevention for generating sites; stream restoration efforts and opportunities and assessment of stream corridors to identify dry weather flows and illegal dumping. The development of the IDDE program is being coordinated by the District using funding contributed by the permittees, including the City, through the Implementation Agreement and also by the City individually. The District, using funding provided through the Implementation Agreement, is developing the necessary database with inputs from permittees, including the City. Additionally, the District and the City, along with other permittees, is conducting monitoring to support the program. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

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f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Section IX.F of the Permit requires permittees, including the City, with septic systems in their jursidictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations. The work to develop the inventory, including an electronic database, is being done by the permittees, including the City, through joint activities funded through the Implementation Agreement. Individual permittees, including the City, will be required to update the database as systems are added or removed from their jurisdictions. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

g. **Permittee Inspection Requirements**: Section X of the Permit requires the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees, including the City include documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance whether a site has required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the General Construction Permit, review of Erosion and Sediment Control Plans, visual observations, compliance with ordinances, permits, WQMPs and assessment of the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of

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several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding requirements of the Permit and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. The cost of these requirements will exceed $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

h. **New Development Requirements**: Section XI of the Permit, as well as Section V.A.2.b and V.B.2 of the MRP, contains numerous new requirements relating to new development and significant re-development projects. These requirements include:

i. Ensuring that control measures to reduce erosion and maintain stream geomorphology are included in culvert and/or bridge crossing designs;

ii. Developing a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identifying program-specific objectives for the WAP; developing a structure for the WAP;

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identifying linkages between the WAP and other plans; identifying other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information; developing a schedule and procedure for maintaining the Geodatabase; reviewing the Geodatabase with Regional Board staff to verify attributes of the Geodatabase; identifying potential causes of identified stream degradation; conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conducting a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; inviting participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, the permittees, including the City, are charged with specifying procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; developing and implementing a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; developing and implementing a HMP prioritized on specified bases; conducting training workshops in the use of the Geodatabase; conducting demonstration workshops for the Geodatabase for senior permittee staff; developing recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implementing applicable retrofit or regional treatment recommendations; and submitting the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the

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WAP and to include those findings in its annual report along with a schedule for necessary revisions.

iii. Reviewing each permittee's general plan and related documents to eliminate barriers to implementation of LID principles and HCOC requirements, with changes in project approval process or procedures to be reflected in the LIP.

iv. For the Principal Permittee, submitting a revised WQMP Guidance and Template to incorporate new elements required by the Permit.

v. Evaluating potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identifying applicable LID principles from a list in the Permit for project specific WQMPs; updating landscape ordinances consistent with the requirements of AB 1881; addressing hydromodification and managing stormwater as a resource through site design BMPs that incorporate LID techniques in a specified manner, requiring priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; reviewing and updating the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensuring that the WQMP specifies methods for determining time of concentration; conducting a feasibility analysis to determine the feasibility of implement LID; integrating the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submitting the updated WQMP Guidance and Template to the RWQCB Executive Officer and implementing the Guidance and Template after approval or, alternatively, requiring implementation of LID BMPs or determining infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site

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conditions do not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, requiring implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis.

vi. Developing standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submitting the draft guidance to the Executive Officer; ensuring that the guidance follows certain principles contained in U.S. EPA guidance; and implementing the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs.

vii. Developing technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs.

viii. Inspecting post-construction BMPs within three years after project completion and every three years thereafter, with the results being included in the annual report;

ix. Establishing a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs and maintaining a database to track all structural treatment control BMPs, including locations and responsible parties;

x. Ensuring that all post-construction BMPs continue to operate and designed and implemented with control measures designed to minimize vectors and ensuring, during inspections that permanent post-construction BMPs installed in new developments are being maintained and operated;

xi. Developing a database to track operation and maintenance of post-construction BMPs, with a copy to be submitted with the annual report; and

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xii. Participating in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of the WAP, revised WQMP, streamlining of regulatory requirements, development of new BMPs and design and other criteria is being conducted jointly by the permittees, including the City, through the Implementation Agreement. Each permittee, including the City, is required to fund all aspects of Section XI of the Permit that apply to permittee-specific activities. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

i. **Public Education and Outreach**: Section XII.A of the Permit requires the permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting is being conducted by the permittees, including the City, jointly under the Implementation Agreement. The implementation of any changes identified through the assessment will be implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

j. **Permittee Facilities and Activities Requirements**: Section XIII of the Permit requires the permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and

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inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to provide the results of the evaluation in the annual report. Compliance with Section XIII involves both joint permittee activity conducted under the Implementation Agreement and individual permittee activities. The inventory of permittee facilities is being conducted both as a joint effort as part of the Geodatabase and individually by each permittee, including the City. The evaluation of the frequency of storm drain system cleaning is being conducted jointly by the permittees under the Implementation Agreement, while the revision of maintenance schedules and the reporting of such efforts is being done by individual permittees, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

k. **Training Requirements**: Section XVI of the Permit requires the permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training. All of these requirements are funded by the permittees, including the City. The permittees, including the City, are required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, and to train staff involved with stormwater related projects and implementation of the Permit and to provide

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such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

l. **Reporting of Non-Compliant Facilities**: Section XVII.D of the Permit requires the permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to specified set of requirements. Permittees, including the City, are required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act ("CWA") Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements require the permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

m. **Program Management Assessment/MSWMP Review**: Section XVIII.B.3 of the Permit and Section VII.E.4 of the MRP require the permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality

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outcomes and the result of municipal enforcement activities. The results of the assessment is required to be incorporated into an amended MSWMP, pursuant to Section XVIII.C of the Permit. These provisions require the permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. The program assessment is initially being performed by the District with funding through the Implementation Agreement, with implementation of requirements being accomplished by each permittee, including the City. The cost of these requirements exceeds $1,000. I am informed and believed that the cost to the City has exceeded $1,000 in FYs 2009-2010 and 2010-2011 and will exceed $1,000 in succeeding FYs during the term of the Permit.

7. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities, with the exception of an integrated waste fund, which funds staff expenses but not the programs and activities under the Permit set forth in this Declaration. On information and belief, the only source of funding for such programs and activities is the City's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 28, 2011, at Rancho Cucamonga, California.

Linda Ceballos

Linda Ceballos

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SECTION 7

DOCUMENTATION

In Support of Joint Test Claims of San Bernardino County Local Agencies Concerning California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036

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EXHIBIT A: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, plus Fact Sheet

EXHIBIT B: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2002-0012, plus Fact Sheet

EXHIBIT C: State Water Resources Control Board Order WQ 2001-15

State Water Resources Control Board Order 2009-0009 DWQ (excerpts)

State Water Resources Control Board Order 97-03 DWQ (excerpts)

EXHIBIT D: California Regional Water Quality Control Board, Santa Ana Region, Resolution No. R8-2006-0023, and Implementation Plan

EXHIBIT E: January 28, 2011 Letter to Lisa Jackson and Peter Silva, U.S. Environmental Protection Agency, from Peter B. King, American Public Works Association, Ken Kirk, National Association of Clean Water Agencies and Susan Gilson, National Association of Flood & Stormwater Management Agencies

EXHIBIT F: March 30, 2011 Letter to Granville M. Bowman, County of San Bernardino, from Kurt V. Berchtold, Executive Officer, Santa Ana Regional Water Quality Control Board

EXHIBIT G: Attachment B, Responses of Santa Ana Regional Water Quality Control Board to Comments on Big Bear Lake Phosphorus TMDL (excerpts)

EXHIBIT H: Federal Cases

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

Natural Resources Defense Council v. U.S. Environmental Protection Agency, 966 F.2d 1292 (9th Cir. 1991)

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)

EXHIBIT I: Federal Law and Regulation

33 U.S.C. § 1342(b)

33 U.S.C. § 1342(p)

40 CFR § 122.26

40 CFR § 122.44

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40 CFR § 130.2

EXHIBIT J: California Cases (not concerning unfunded state mandates)

City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613

Communities for a Better Environment v. State Water Resources Control Board (2003) 109 Cal.App.4th 1089

EXHIBIT K: California Statutes

Water Code § 13050

Water Code § 13260

Water Code § 13263

Water Code §§ 13290-13291.7

Water Code § 13367

Water Code § 13370

EXHIBIT L: Other Cases

Tualatin Riverkeepers v. Oregon Dept. of Environmental Quality, 235 Ore. App. 132 (2010)

EXHIBIT M: San Bernardino County Implementation Agreements

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EXHIBIT A

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California Regional Water Quality Control Board
Santa Ana Region

Linda S. Adams
Secretary for
Environmental Protection

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www.waterboards.ca.gov/santaana

Arnold Schwarzenegger
Governor

February 3, 2010

Dr. Matt A. Yeager, D. Env
Storm Water Program Manager
San Bernardino County Flood Control District
825 E. Third Street, Room 201
San Bernardino, CA 92415

WASTE DISCHARGE REQUIREMENTS FOR THE COUNTY OF SAN BERNARDINO AND THE INCORPORATED CITIES OF SAN BERNARDINO COUNTY, ORDER NO. R8-2010-0036, NPDES NO. CAS618036, AREAWIDE URBAN STORM WATER RUNOFF

Dear Dr. Yeager,

Enclosed is a certified copy of Order No. R8-2010-0036, NPDES No. CAS 618036. This order renews waste discharge requirements for the discharge of urban storm water from areas of San Bernardino County within the Santa Ana Region to waters of the U.S. This order was adopted at a public hearing during the January 29, 2010 Board meeting. Please note that Order No. R8-2010-0036 expires on January 29, 2015 and a Report of Waste Discharge must be filed no later than 180 days in advance of that expiration date.

If you have any questions, please call Maria Macario at (951) 321-4583.

Sincerely,

Gerard J. Thibeault
Executive Officer

Enclosures: Adopted Order No. R8-2010-0036 w/ attachments

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STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SANTA ANA REGION

3737 Main St, Suite 500, Riverside, CA 92501-3348
(951) 782-4130 • Fax (951) 781-6288
http://www.waterboards.ca.gov/santaana

ORDER NO. R8-2010-0036
NPDES NO. CAS618036

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, THE COUNTY OF SAN BERNARDINO, AND THE INCORPORATED CITIES OF SAN BERNARDINO COUNTY WITHIN THE SANTA ANA REGION

AREA-WIDE URBAN STORM WATER RUNOFF MANAGEMENT PROGRAM

The following Dischargers (Table 1) are subject to waste discharge requirements as set forth in this Order:

Table 1. Municipal Permittees

Principal Permittee	San Bernardino County Flood Control District (SBCFCD)	
Co-Permittees	1. County of San Bernardino	9. City of Loma Linda
	2. City of Big Bear Lake	10. City of Montclair
	3. City of Chino	11. City of Ontario
	4. City of Chino Hills	12. City of Rancho Cucamonga
	5. City of Colton	13. City of Redlands
	6. City of Fontana	14. City of Rialto
	7. City of Grand Terrace	15. City of San Bernardino
	8. City of Highland	16. City of Upland
		17. City of Yucaipa

The Principal Permittee and the Co-Permittees are collectively referred to as the Permittees or the Dischargers.

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Table 2. Administrative Information

This Order was adopted by the Regional Water Quality Control Board on:	**January 29, 2010**
This Order shall become effective on:	**January 29, 2010**
This Order shall expire on:	**January 29, 2015**
The U.S. Environmental Protection Agency (USEPA) and the Regional Water Board have classified this discharge as a major discharge.	
The Discharger shall file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations, as application for issuance of new waste discharge requirements no later than 180 days in advance of the Order expiration date.	

IT IS HEREBY ORDERED, that this Order supersedes Order No. R8-2002-012 except for enforcement purposes, and, in order to meet the provisions contained in division 7 of the Water Code (commencing with section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act (CWA) and regulations and guidelines adopted thereunder, the Dischargers shall comply with the requirements in this Order.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on January 29, 2010.

Gerard J. Thibeault, Executive Officer

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I. FACILITY INFORMATION

A. Each of the Permittees listed in Table 1, above, owns and/or operates storm water and urban runoff conveyance systems, including flood control facilities. These conveyance systems are commonly referred to as municipal separate storm sewer systems (MS4s[1]) or storm drains, through which storm water and urban runoff are discharged into waters of the United States (Waters of the U.S.) that are located within the Santa Ana Region. Some of the natural channels, streambeds and other drainage facilities that are generally considered as Waters of the U.S. have been converted to flood control facilities. In such cases, where a natural streambed is modified to convey storm water flows, the conveyance system becomes both an MS4 and a water of the U.S. The primary purpose for which these MS4s were constructed was for flood control to minimize threat to public safety and property damage. 40 CFR 122.26(b) categorizes MS4s as follows: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) an MS4 which contributes to a violation of a water quality standard; (3) an MS4 which is a significant contributor of pollutants to waters of the United States; or (4) an MS4 owned and/or operated by a small municipality that is interrelated to a medium or large municipality. Urban Runoff[2] from these MS4 systems must be regulated under a National Pollutant Discharge Elimination System (NPDES) permit as per Section 402(p) of the federal Clean Water Act (CWA).

B. This Order regulates the discharge of pollutants (as defined in Attachment 4, Glossary) in Urban Runoff from anthropogenic (generated from non-agricultural human activities) sources from MS4s that are either under the jurisdiction of the Permittees, and/or where Permittees have MS4 maintenance responsibility, or have authority to approve modifications of the MS4s. Urban Runoff includes those discharges from residential, commercial, industrial and construction areas within the permitted area and excludes discharges from feedlots, dairies, and farms or other agricultural activities. The Permittees have jurisdiction over and/or maintenance responsibility for storm water conveyance systems within San Bernardino County. The Permittees lack legal jurisdiction over storm water discharges into their systems from State and federal facilities, e.g., schools and hospitals, utilities and special districts, Native American tribal lands, wastewater management agencies and other point and non-point source discharges otherwise permitted by the Regional Board. The Regional Board recognizes that the Permittees should not be held responsible for such facilities and/or

[1] A MS4 (municipal separate storm sewer system) system is any conveyance or a system of conveyances designed to collect and transport storm water which is not part of a Publicly Owned Treatment Works (i.e., not a combined sewer).

[2] Urban runoff is defined as all flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) authorized non-storm water discharges

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discharges. The Regional Water Board will coordinate with these entities to implement programs that are consistent with the requirements of this Order. The Regional Board, pursuant to 40 CFR 122.26(a), has the discretion and authority to require non-cooperating entities to participate in this Order. The Regional Board may also consider such facilities for coverage under its NPDES permitting scheme pursuant to USEPA Phase II storm water regulations.

C. To the extent that the Permittees authorize the connection of these discharges into their MS4s, this Order requires the Permittees to provide written notification of Water Quality Management Plan (WQMP) requirements for post-construction BMPs and/or other applicable requirements of this Order. A WQMP approved by the Permittee who owns the MS4 may constitute compliance with the General Construction Permit post-construction requirements[3] for the Permit Area.

D. Certain activities that generate pollutants present in storm water runoff may be beyond the ability of Permittees to prevent or eliminate. Examples of these include, but are not limited to: emissions from internal combustion engines, brake pad and tire wear, atmospheric deposition, bacteria from wildlife (including feral dogs and cats) or from bacterial resuscitation or reactivation from treated waters or growth of bacteria in the environment (such as in sediments, surface water, or other substrate), and leaching of naturally occurring nutrients and minerals from local soils. This Order is not intended to address background or naturally occurring pollutants or flows.

E. The Permittees serve a population of approximately 1.5 million[4] (75% of the County population), occupying an area of approximately 620 square miles[5]. The permitted area is shown on Attachment 1.

F. The Permittees' MS4 systems include an estimated 378 miles of above-ground channels and 485 miles of underground storm drain channels, for a total of 863 miles within the permitted area. Approximately seven percent (7%) of the San Bernardino County area drains into water bodies within this Regional Board's jurisdiction. This Order regulates urban and storm water runoff from areas within the Santa Ana Regional Board's jurisdiction. Approximately 50% of the remaining San Bernardino County drainage areas are within the jurisdiction of the Lahontan Regional Board. Urban and storm water runoff from those areas is regulated by the Lahontan Regional Board. The other 43% is within the jurisdiction of the Colorado River Basin Regional Board. The Colorado River Basin Regional Board regulates urban and storm water runoff from those areas. As indicated above, most of the urbanized areas of San Bernardino County are located within the Santa Ana Regional Board's jurisdiction.

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[3] The State General Construction Permit Order No. 2009-0009-DWQ Section XIII.

[4] Per 2006 Report of Waste Discharge (ROWD).

[5] Per 2006 ROWD.

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II. FINDINGS

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter the Regional Board) finds that:

A. Background

1. The Co-Permittees own and operate flood control facilities.
2. The discharge of Urban Runoff from the San Bernardino County areas within the Santa Ana Region is currently regulated under Order No. R8-2002-0012, National Pollutant Discharge Elimination System (NPDES) Permit No. CAS 618036. Order No. R8-2002-0012 expired on April 27, 2007 and was administratively extended until adoption of this Order in accordance with Title 23, Division 3, Chapter 9, §2235.4 of the California Code of Regulations.
3. The Permittees jointly submitted a Report of Waste Discharge (ROWD) on October 26, 2006, as application to renew their NPDES permit. To effectively carry out the requirements of this Order, the Permittees have agreed that the San Bernardino County Flood Control District (SBCFCD) will continue as the Principal Permittee and the County and the 16 incorporated cities will continue as the Co-Permittees.
4. The ROWD proposed revisions to the Municipal Storm Water Management Plan (MSWMP) that includes performance commitments for each program element, letters of intent from each of the eighteen Permittees listed in Table 1, and proposed activities to be conducted during the fourth term permit. The MSWMP incorporated a number of other documents by reference. The ROWD, the letters of intent, the MSWMP and the documents referenced therein are hereby made enforceable elements of this Order. The ROWD included: (a) a summary of accomplishments; (2) discharge characterization; (3) program effectiveness analysis; and (4) recommendations for program improvements.
5. This Order, Order No. R8-2010-0036 (hereinafter the Order or the Permit), renews NPDES Permit No. CAS618036 that was first issued on October 19, 1990 (Order No. 90-136, first-term permit) and renewed on March 8, 1996 (Order No. 96-32, second-term permit) and October 25, 2002 (Order No. R8-2002-0012, third-term permit). Order No. R8-2010-0036 is the fourth-term permit. The Permit outlines additional steps for an effective, risk-based, storm water management program and specifies requirements to meet applicable water quality standards. This Order requires the Permittees to investigate sources of pollutants in storm water runoff where activities that the Permittees conduct, approve, regulate or authorize through their licensing and permitting processes, have a reasonable potential to exceed water quality standards.

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B. **Regulatory Basis/Legal Authorities**

1. This Order is issued pursuant to CWA Section 402(p) (USC §1342(p)) and implementing regulations adopted by the United States Environmental Protection Agency (USEPA) as codified in Code of Federal Regulations, Title 40, Parts 122, 123, and 124 (40 CFR 122, 123 & 124); the Porter Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000); all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (State Board); the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan); the California Toxics Rule (CTR); and the California Toxics Rule Implementation Plan. The Basin Plan also incorporates all state water quality control plans and policies. This Order also serves as Waste Discharge requirements (WDRs) pursuant to Article 4, Chapter 4, Division 7 of the Water Code (commencing with Section 13260).

2. This Order is consistent with the following precedential Orders adopted by the State Board addressing municipal storm water NPDES permits: Order 99-05-DWQ (Petition of Environmental Health Coalition/Receiving Water Limitation Language for Municipal Storm Water Permits); Order WQ-2000-11 (Petitions of Bellflower, City of Arcadia, Western States Petroleum Association/Review of RWQCB and Its Executive Officer Pursuant to Order 96-054, Permit for Municipal Storm Water and Urban Run-Off Discharges within Los Angeles County); Order WQ 2001-15 (In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association); and Order WQO 2002-0014 (Petitions of Aliso Viejo, et al/Order to stay provision F.5.f of the permit and part of last sentence of Finding 26 (permit issued by San Diego Regional Board)).

3. The requirements contained in this Order are deemed necessary to protect water quality standards[6] of the receiving waters and to implement the plans and policies described in Finding 1, above. These plans and policies contain numeric and narrative water quality standards for the waterbodies in this Region. In accordance with Section 402(p)(2)(B)(iii) of the CWA and its implementing regulations (40 CFR Parts 122, 123, & 124), this Order requires the Permittees to develop and implement programs and policies necessary to reduce the discharge of pollutants in Urban Runoff to Waters of the U.S. to the maximum extent practicable (MEP). The legislative history and the preamble to the federal storm water regulations (40 CFR Parts 122, 123 and 124) indicate that Congress and the USEPA were aware of the difficulties in regulating Urban Runoff solely through traditional end-of-pipe treatment. Consistent with the CWA, it is the Regional Board's intent that this Order require the implementation of

[6] Under the Clean Water Act, the beneficial uses and the water quality objectives to protect those beneficial uses are collectively referred to as water quality standards.

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best management practices (BMPs)[7] to reduce, consistent with the MEP standard, the discharge of pollutants in urban storm water from the MS4s in order to support attainment of water quality standards.

4. On June 17, 1999, the State Board adopted Water Quality Order No. 99-05. This is a precedential Order that incorporates the receiving water limitations language recommended by USEPA. Consistent with the State Board's order, this Order requires the Permittees to comply with the applicable water quality standards, which is to be achieved through an iterative approach requiring the implementation of BMPs that are designed to meet water quality standards. Most municipal storm water permits issued in California specify certain minimum control measures and incorporate an iterative process that requires increasingly more effective control measures if the water quality standards are not met.

5. This Order is also consistent with the 2006 San Bernardino County Superior Court decision related to storm water permitting that upheld the Regional Board's position regarding the City of Rancho Cucamonga's appeal of the 2002 San Bernardino County MS4 Permit, Order No. R8-2002-0012 (City of Rancho Cucamonga vs. Regional Water Quality Control Board – Santa Ana Region, Fourth Appellate Court, Super. Ct. No. RCV 071613).

6. This Order does not constitute an unfunded mandate subject to subvention under Article XIII.B, Section (6) of the California Constitution for several reasons, including the following:

   a. This Order implements federally mandated requirements under Clean Water Act Section 402(p)(3)(B). (33 USC §1342(p)(3)(B)).
   b. The Permittees' obligation under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges.
   c. The Permittees have the authority to levy service charges, fees, or assessments to pay for compliance with this Order. Certain assessments may require voter approval[8].
   d. The Permittees requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act Section 301, subdivision (a). (33 USC §1311(a)).

[7] Best Management Practices (BMPs) are programs, policies and practices, including structural and engineering controls, to control the discharge of pollutants that are maximized in efficiency. Also see BMP definition under Glossary.

[8] For example, the City of Santa Cruz voted to raise property taxes to fund the storm water program at the November 4, 2008 election (see: http://www.santacruzsentinel.com/localnews/ci_10904561).

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C. **Rationale for Requirements**

1. The Regional Board developed the requirements in this Order based on information submitted as part of the ROWD, the MSWMP, monitoring and reporting data, program audits, and other available information and these requirements are consistent with the federal and state laws and regulations. The Fact Sheet (Attachment 6) contains additional regulatory background information and rationale for requirements in this Order. The Fact Sheet is hereby incorporated into this Order and constitutes part of the Findings for this Order. Attachments 1 through 9 are also incorporated into this Order.
2. The ROWD included a program effectiveness analysis and recommended a shift in the San Bernardino County MS4 program from programmatic/administrative tasks to compliance based on water quality standards and on tasks identified in the implementation plans for total maximum daily loads (TMDLs). The MSWMP includes risk-based, outcome-oriented and compliance-focused programs and performance commitments. The MSWMP is a dynamic document that implements programs and policies to control the discharge of pollutants in Urban Runoff consistent with the MEP standard. If the control measures proposed and implemented as per the MSWMP and other requirements included in this Order are not effective in meeting water quality standards, the Permittees are required to revise the MSWMP with more effective control measures.
3. The MSWMP includes the Permittees' performance commitments for each of the major program elements and those performance commitments are incorporated into this Order.
4. Regional Board staff evaluated each of the Permittees' storm water programs and determined that one of the major deficiencies in the programs was a lack of a written procedure on how to implement various elements of the MSWMP. This Order requires each of the Permittees to develop and implement its own Local Implementation Plan (LIP). The LIP should document internal procedures for implementation of the program elements described in the MSWMP.
5. This Order requires the Permittees to revise the MSWMP and associated documents, as needed, to incorporate any applicable requirements in this Order, any applicable TMDLs adopted by the Regional Board and approved by the State Board, Office of Administrative Law and the USEPA, and to incorporate any additional applicable BMPs needed to meet water quality standards. All documents submitted in accordance with this Order for approval by the Executive Officer or the Regional Board

will be publicly noticed prior to approval by the Executive Officer or the Regional Board[9].

D. **California Environmental Quality Act (CEQA)**

1. Under Water Code Section 13389, this action to adopt an NPDES permit is exempt from the provisions of CEQA, Public Resources Code Sections 21100 et seq. (*County of Los Angeles v. California State Water Resources Control Board* (2006) 142 Cal.App.4th 985, mod. (Nov 6, 2006, B184034) 50 Cal. Rptr.3d 619, 632-636.) This action also involves the re-issuance of waste discharge requirements for existing MS4s that discharge storm water and urban runoff and as such, is exempt from the provisions of California Environmental Quality Act (commencing with Section 21100) in that the activity is exempt pursuant to Title 14 of the California Code of Regulations Section 15301.

E. **Discharge Characteristics/Risk-Based Storm Water Management**

1. This Order regulates the discharge of pollutants from anthropogenic (generated from human activities, excluding agricultural activities) sources and/or activities in urban and storm water runoff, and certain types of de-minimus discharges specifically authorized under Section V of this Order, from areas under the jurisdiction of the Permittees. The term storm water as used in this Order includes storm water runoff, snowmelt runoff, and surface runoff and drainage. Storm water discharges consist of surface runoff that discharges into Waters of the U.S. The quality of these discharges varies considerably and is affected by land use activities, hydrology and geology, season, the frequency and duration of storm events, and the presence of illicit disposal practices and illegal connections.

2. Studies conducted by the USEPA, the states, counties, cities, flood control districts and other political entities dealing with urban and "storm water" runoff identified the following major sources of urban runoff "pollution" nationwide[10]:

   a. Industrial sites where appropriate pollution prevention and best management practices (BMPs) are not implemented;

[9]The Executive Officer shall provide members of the public with notice and at least a 30-day comment opportunity for all documents submitted in accordance with this Order. If the Executive Officer, after considering timely submitted comments, concludes that the document is adequate or adequate with specified changes, the Executive Officer may approve the document or present it the to Board for its consideration at a regularly scheduled and noticed meeting. If there are significant issues that cannot be resolved by the Executive Officer, the document will be presented to the Board for its consideration at a regularly scheduled meeting.

[10] See Attachment 4-Glossary, for definition of "storm water", and "pollution".

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b. Construction sites where erosion and siltation controls and other BMPs are not implemented; and,
c. Runoff from urbanized areas; and
d. Natural background, including leaching of naturally-occurring nutrients and minerals from local soils.

3. A number of permits have been adopted to address pollution from the anthropogenic sources identified in Finding 2, above. The State Board issued three statewide general NPDES permits: one for storm water runoff from industrial activities (NPDES No. CAS000001, General Industrial Activities Storm Water Permit), a second permit for storm water runoff from construction activities (NPDES No. CAS000002, General Construction Activity Storm Water Permit) and a third permit for Storm Water Runoff Associated with Small Linear Underground/Overhead Construction Projects (CAS000005, now incorporated into NPDES No. CAS000002). Industrial activities (as identified in 40 CFR 122.26(b)(14)) and construction sites of one acre or more, are required to obtain coverage under these statewide general permits. The permittees have developed project conditions of approval for projects requiring coverage under the State's General Permits to be effective at the time of grading or building permit issuance for construction sites on one acre or more and at the time of local permit issuance for industrial facilities.

4. The State Board also adopted NPDES No. CAS000003 for storm water runoff from facilities (including freeways and highways) owned and/or operated by California Department of Transportation (Caltrans) and NPDES No. CAS000004, for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems. The Regional Board adopted Order No. R8-2007-0001, NPDES No. CAG018001, for concentrated animal feeding operations, including dairies. The Regional Board also issues individual storm water permits for certain industrial facilities within the Region. Currently there are two facilities located within San Bernardino County (California Steel and Ecology Auto Wrecking[11]) with individual storm water permits. Additionally, for a number of facilities that discharge process wastewater and storm water, storm water discharge requirements are included with the facilities' NPDES permit for process wastewater.

5. In most cases, the industries and construction sites covered under the Statewide General Industrial and Construction Permits discharge into storm drains and/or flood control facilities owned and operated by the Permittees. The Permittees have enacted a system of local ordinances, building permits and business licensing practices to regulate residential, industrial and construction sites within their jurisdiction for the purpose of reducing storm water pollution consistent with the maximum extent practicable standard.

[11] Ecology Auto Wrecking does not discharge storm water into waters of the U.S.

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6. The Regional Board administers compliance with the State's General Industrial and Construction Activities Storm Water Permits. A coordinated effort between the Permittees and the Regional Board staff is critical to avoid duplicative effort when overseeing the compliance of dischargers covered under these General Permits. As part of this coordination, the Permittees have been notifying Regional Board staff when, during their routine activities, they observe conditions that pose a potential threat to water quality or when they discover an industrial facility or construction activity that failed to obtain coverage under the applicable general storm water permit.

7. The Permittees have conducted storm water and receiving water monitoring as required under the first, second and third term permits. These monitoring data and data from other sources have confirmed that urban and storm water may contain waste, as defined in CWC § 13050, and pollutants that adversely affect the quality of the Waters of the U.S. The discharge of Urban Runoff from an MS4 is defined in the CWA as a "discharge of pollutants from a point source" into Waters of the U.S.

8. Urban and storm water runoff may contain elevated levels of pathogens (bacteria, protozoa, viruses), sediment, trash, fertilizers (nutrients: nitrogen and phosphorus compounds), pesticides (DDT, chlordane, diazinon, chlorpyrifos, etc.), heavy metals (cadmium, chromium, copper, lead, zinc, etc.), and petroleum products (oil, grease, petroleum hydrocarbons, polycyclic aromatic hydrocarbons, etc.). Storm water can carry these pollutants to rivers, streams, lakes, bays and the ocean (receiving waters).

9. These pollutants can impact the beneficial uses of the receiving waters and can cause or threaten to cause a condition of pollution or nuisance.

10. Pathogens (from sanitary sewer overflows, septic system leaks, spills and leaks from portable toilets, pets, wildlife, and human activities) can impact water contact recreation and non-contact water recreation. Runoff from San Bernardino County areas is tributary to the Santa Ana River which periodically discharges into the Pacific Ocean in Orange County. Although microbial contamination of the beaches from urban runoff and other sources has resulted in beach closures and health advisories in Orange County, discharges from San Bernardino County are typically captured and infiltrated in designated recharge areas downstream of Prado Dam. In the middle Santa Ana River basin areas, the bacterial levels exceed the Basin Plan objectives (see Finding F, below).

11. The Santa Ana River Watershed has been hydraulically separated into the Upper SAR Watershed (upstream from Prado Dam), and the Lower SAR Watershed (downstream from Prado Dam) since the construction of Prado Dam in 1941. The Regional Board regulates discharges from sewage treatment plants upstream of the dam. According to the USGS (2004[12]),

[12] Water Quality in the Santa Ana Basin, California, 1999-2001, Kenneth Belitz, et al, USGS Circular 1238. January 29, 2010 (Final)

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water managers utilize almost all of the base flow and most of the stormflow to recharge the coastal aquifer system. Baseflow consists primarily of treated wastewater. Baseflows from the dam are managed, in coordination with the US Army Corps of Engineers, to be captured and infiltrated downstream from the dam; stormflows occasionally exceed the infiltration capacity (OCWD 2009[13]). Water quality in flows from the dam have been monitored for over 40 years and generally found to meet water quality standards specified in the Basin Plan. The dam and the wetlands help to reduce pollutant transport from the upper watershed to the lower watershed. The impoundment area also reduces the transport of trash and debris. As such, water quality management in the upper watershed is targeted to primarily address problems upstream from Prado Dam. Addressing pollutants of concern above Prado Dam will also improve water quality downstream. Augmentation of groundwater through infiltration of baseflow and stormflow is also actively managed in the upper watershed area (e.g. 2006 Chino Creek Integrated Plan: Guidance for Working Together to Protect, Improve, and Enhance the Lower Chino Creek Watershed).

12. Oil and grease from spills can coat birds and aquatic organisms, adversely affecting respiration and/or thermoregulation. Other petroleum hydrocarbon components may cause toxicity to aquatic organisms and may impact human health.

13. Suspended and settleable solids (from construction sites, other sediment sources, trash, and industrial activities) may be deleterious to benthic organisms and may cause anaerobic conditions to form. Sediments and other suspended particulates can cause turbidity, clog fish gills and interfere with respiration in aquatic fauna. They may also screen out light, hindering photosynthesis and normal aquatic plant growth and development.

14. If released into the environment, toxic substances (including pesticides, petroleum products, metals, and industrial wastes) can cause acute and/or chronic toxicity, and can bioaccumulate in organisms to levels that may be harmful to human health.

15. Excessive levels of nutrients (from fertilizer use, fire fighting chemicals, decaying plants, confined animal facilities, pets, and wildlife) can cause excessive algal blooms. These blooms may lead to problems with taste, odor, color and increased turbidity, and may depress the dissolved oxygen content, leading to fish kills.

16. Trash and debris, in particular plastics, are aesthetic nuisances and as threats to freshwater and marine environments. Plastic debris harms hundreds of wildlife species through ingestion, entanglements and

[13] Orange County Water District: Groundwater Management Plan, 2009 Update. July 9, 2009, pp. 4-4 January 29, 2010 (Final)

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entrapment. Plastic nurdles[14] have the capability of absorbing pollutants, such as PCBs, and when ingested by wildlife, expose those animals to pollutant concentrations that are orders of magnitude higher than the surrounding water. Water Code Section 13367 requires the State Board and the regional boards to implement a program to control discharges of pre-production plastic from point and nonpoint sources. "Floatables" (from trash and debris) are an aesthetic nuisance and can be a substrate for algae and insect vectors. This Order requires the Permittees to control the discharge of trash and debris, including plastic nurdles, from the MS4s to Waters of the U.S.

17. Management of dry weather discharges resulting from urbanization provides an opportunity to promote water conservation as well as address water quality. This Order requires the Permittees to promote and implement best management practices for water conservation, and thereby, minimize non-stormwater flows into and from the MS4s.

18. In order to characterize storm water discharges, to identify problem areas, to determine the impact of urban runoff on receiving waters, and to determine the effectiveness of the various BMPs, an effective monitoring program is critical. The Principal Permittee administers the monitoring program for the Permittees. This program includes storm drain outfall monitoring, receiving water monitoring, and dry weather monitoring. The ROWD compared the monitoring results to: (a) water quality objectives in the Basin Plan; (b) CTR objectives; and (c) USEPA storm water benchmarks contained in the USEPA Multi-Sector Industrial Storm Water Permit. In order to ascertain overall water quality conditions in the permitted area, the Permittees also evaluated monitoring data from other sources such as: (a) National Water Quality Assessment conducted by the USGS[15] (NAWQA); and (b) Santa Ana Regional Water Quality Board's Water Quality Assessment per Section 305(b) of the CWA (RWQCB 305(b) Assessment).

19. The Permittees' water quality monitoring data submitted to date document a number of exceedances of water quality objectives specified in the Basin Plan, CTR criteria and/or USEPA's storm water bench mark for fecal coliform bacteria, total suspended solids, nutrients, COD and metals These findings indicate that urban and storm water runoff is causing or contributing to water quality impairments.

20. Comparison of wet weather water quality monitoring data for 2000-2006[16] with that from 1994-1999[17] shows that the median concentrations for most

[14] Nurdles: pre-production plastic pellets or plastic resin pellets

[15] Belitz, K., Hamlin, S.N.,Burton, C.A., Kent, R., Fay, R.G., and Johnson, T., 2004. *Water Quality in the Santa Ana Basin, California,* 1999-2001.Circular 1238. U. S. Geological Survey. (This is only one of several USGS reports.)

[16] 2006 ROWD

[17] 2002 ROWD

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constituents have not changed significantly. Furthermore, monitoring data for the period 1994-2006 indicate that median concentrations of wet weather composite samples at monitoring stations[18] 2, 3, and 8 exceeded the USEPA benchmarks for TSS, COD, NO_3-N, and metals. With the exception of Site 10 (Santa Ana River upstream of Seven Oaks Dam, with drainage from mostly undeveloped areas), coliform bacteria concentrations were far above the Basin Plan water quality objectives. These data support the need for continued monitoring and additional control measures to control the discharge of pollutants from the MS4s.

21. A limited number of constituents were monitored during dry weather at representative urban runoff locations and some of these constituents also exceeded the Basin Plan objectives. These findings indicate that additional surveillance and controls may be needed to minimize and/or eliminate dry weather flows into and from the MS4s.

22. The Principal Permittee conducted an analysis of the receiving water monitoring data collected during the last 15 years for a number of monitoring sites (Sites 2, 3, 8[19], and 10[20]). This analysis indicates that the most significant water quality problem associated with urban and storm water runoff is bacterial contamination. It also showed that Basin Plan objectives for metals such as lead, copper, and zinc[21] are exceeded more frequently than Federal promulgated standards. The Permittees monitoring data were then compared to monitoring data available from other sources (NAWQA, RWQCB 305(b) Assessment) to determine beneficial use impacts and pollutants causing the impacts. This analysis was then used to prioritize problem areas and to propose a risk-based approach to address these problems.

23. Based on the evaluation of monitoring data described above, the ROWD prioritized the pollutants of concern with regards to storm water management as follow:

    a. High Priority: Coliform bacteria
    b. Medium Priority: Zinc, copper, lead
    c. Low Priority: Nutrients, COD, TSS

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[18] Drainage at Site 2 (Cucamonga Creek @ Hwy 60) is predominantly urban, influenced by commercial and industrial land uses with some contribution from open space/rural and residential land uses. The predominant land use at Site 3 (Cucamonga Creek @ Hellman) is agricultural, but there is contribution from open space/rural, and discharge from a municipal wastewater treatment plant between Sites 2 and 3. Monitoring site 5 (Hunts Lane n/o Hospitality Lane) is within a constructed storm drain system and flow is mostly from commercial and light industrial land uses with some urban contribution.

[19] Site 8 station is located in the Santa Ana River (SAR) at Hamner Avenue, runoff is mostly from urban land uses.

[20] Site 10 station is located at SAR, upstream of Seven Oaks Dam; runoff is mostly from open/rural areas.

[21] There is no Basin Plan objective for zinc, USEPA benchmark is 0.117 mg/l.

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F. **CWA Section 303(d) Listed Waterbodies and TMDLS (Also see Section L)**

1. Considerable sampling data have been collected to characterize ambient receiving water quality in the Region. Water quality assessments conducted by the Regional Board have identified a number of beneficial use impairments, due in part, to urban runoff. Section 305(b) of the CWA requires each of the regional boards to routinely monitor and assess the quality of waters of its region. If this assessment indicates that beneficial uses are not met, then that waterbody must be listed under Section 303(d) of the CWA as an impaired waterbody.
2. The Regional Board's 2006 water quality assessment listed a number of water bodies within the permitted area under Section 303(d) as impaired water bodies (see Table 3)[22].
3. Federal regulations require that a total maximum daily load (TMDL) be established for each 303(d) listed waterbody for each of the pollutants causing impairment. The TMDL is the maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. A TMDL is the sum of the individual wasteload allocations (WLA) for point source inputs, load allocations (LA) for non-point source inputs and natural background, with a margin of safety. The TMDLs are one of the bases for limitations established in waste discharge requirements.
4. For 303(d) listed waterbodies without a TMDL, the Permittees are required to participate in the development and implementation of TMDLs and Watershed Action Plans. If a TMDL has been developed and an implementation plan is yet to be developed (e.g., when the USEPA has established the TMDL), the Permittees are required to develop constituent specific source control measures, conduct additional monitoring and/or cooperate with the development of an implementation plan.

Table 3. CWA Section 303(d) List of Water Quality Limited Segments, Santa Ana Region {Waterbodies Requiring a TMDL in San Bernardino County[1]}

Water Body Name	Pollutant / Stressor	Potential Sources	Proposed TMDL Completion
Big Bear Lake	Copper[2]	Resource extraction	2007
	Mercury	Resource extraction[5]	2007
	Metals	Resource extraction	2007

[22] On April 24, 2009, the Regional Board adopted Resolution No. R8-2009-0032 approving the 2008 Integrated Report of Federal Clean Water Act Section 305(b) and Section 303(d) List of Water Quality Limited Segments. Minor additional modifications were approved by the Regional Board on October 23, 2009. When the revised list is approved by the State Board and the USEPA, the 2006 list will be updated.

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	Noxious aquatic plants	Construction/Land development, Unknown point source	2006
	Nutrients	Construction/Land development, Snow skiing activities	2006
	PCBs (Polychlorinated biphenyls)	Source unknown	2019
	Sedimentation/Siltation[3]	Construction/Land development, Snow skiing activities, Unknown nonpoint source	2006
Summit Creek	Nutrients	Construction/Land development	2008
Knickerbocker Creek	Pathogens[4]	Unknown nonpoint source	2005
	Metals	Unknown nonpoint source	2007
Grout Creek	Metals	Unknown nonpoint source	2007
	Nutrients	Unknown nonpoint source	2008
Rathbone (Rathbun) Creek	Sedimentation/Siltation	Unknown nonpoint source Snow skiing activities	2006
	Nutrients	Unknown nonpoint source Snow skiing activities	2008
Mountain Home Creek	Pathogens	Unknown nonpoint source	2019
Mountain Home Creek, East Fork	Pathogens	Unknown nonpoint source	2019
Lytle Creek	Pathogens	Unknown nonpoint source	2019
Mill Creek (Prado Area)	Nutrients	Agriculture, Dairies	2019
	Total Suspended Solids (TSS)	Dairies	2019
Prado Park Lake	Nutrients	Nonpoint source	2019
Chino Creek Reach 1	Nutrients	Agriculture, Dairies	2019
Mill Creek Reach 1	Pathogens	Unknown nonpoint source	2019
Mill Creek Reach 2	Pathogens	Unknown nonpoint source	2019
Santa Ana River, Reach 4	Pathogens	Nonpoint source	2019

[1] Based on STATE BOARD 2006 CWA Section 303(d) List of Water Quality Limited Segments, Santa Ana Regional Water Quality Control Board, USEPA Approved June 28, 2007 (http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/303dlists2006/epa/r8_06_303d_reqtmdls.pdf)

[2] Big Bear Lake is recommended for delisting for copper in the Proposed 2008 303(d)-305(b) Integrated Report

[3] Big Bear Lake is recommended for delisting for sedimentation/siltation in the Proposed 2008 303(d)-305(b) Integrated Report

[4] (See Section 6, below).

[5] Resource extraction was removed as a potential source for Mercury in Big Bear Lake and replaced with atmospheric deposition in the Proposed 2008 303(d)-305(b) Integrated Report

5. Big Bear Lake is included under the 2006 CWA Section 303(d) list for mercury. Historical and recent monitoring conducted by Regional Board staff and other entities confirm that the Office of Environmental Health

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Hazard Assessment's (OEHHA) mercury fish tissue screening level of 0.3 mg/kg has been exceeded. This finding is likely to impact REC1 (fishing) uses of Big Bear Lake. Recent monitoring efforts and technical support documents (Tetra Tech, 2008)[23] to determine the source of mercury and to develop TMDLs indicate that though majority of the watershed load originates from atmospheric deposition, delivery is dependent on runoff and sediment transport to the lake. However, there is insufficient data to draw conclusions about the effect of urbanization on mercury input to the Lake.

a. It has been demonstrated that mercury loadings are proportional to fine sediment loads and sediment loads are directly proportional to increases in flow rates.

b. Urbanization generally increases impermeable surfaces and that results in increased flow rates which in turn could increase mercury loadings to Big Bear Lake.

c. The Big Bear Lake Mercury TMDL is expected to be completed and approved within this permit cycle. This Order may be reopened to include any additional requirements from the Mercury TMDL Implementation Plan.

d. Pending adoption of the Big Bear Lake Mercury TMDL, this Order requires the stakeholders to participate in the implementation of control measures to minimize the impact of urbanization on water quality.

6. **Knickerbocker Creek Sole Source Pathogen Investigation and Control:**

a. Knickerbocker Creek is one of Big Bear Lake's tributaries. It is engineered and constructed of concrete through the Big Bear Village area to carry flows from 100-year frequency flood event, but is a natural channel within the upper boundaries of the City and the Forest Service area. The Creek is an ephemeral stream that flows largely in response to storm events or during the spring when runoff is comprised largely of snowmelt.

b. The Basin Plan designates municipal and domestic water supply (MUN), water contact recreation (REC1) and non-contact water recreation (REC2) as beneficial uses of Knickerbocker Creek.

c. To protect MUN beneficial use, the Basin Plan specifies a numeric water quality objective for total coliform of less than 100 organisms/100 mL. To protect REC1 beneficial use, the Basin Plan specifies numeric water quality objectives for fecal coliform indicator bacteria of log mean less than 200 organisms/100 mL based on five or more samples/30

[23] Big Bear Lake Technical Support Document for Mercury TMDL,, September 2008, Prepared by Tetratech for U.S EPA Region 9 and Santa Ana Regional Water Quality Board

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day period and not more than 10% of the samples shall exceed 400 organisms/100 ml for any 30-day period.

d. In 1994, Regional Board issued a report titled "The Investigation of Toxics and Nutrients in Big Bear Lake" which included test results for Big Bear Lake and many of its tributaries for bacterial indicators.

e. The test results indicated that Knickerbocker Creek had bacteria indicator levels that exceeded the MUN and REC1 Basin Plan objectives for total coliform and fecal coliform. In 1994, Knickerbocker Creek was placed on the Clean Water Act Section 303(d) List as impaired for pathogens.

f. As a result of the 303(d) listing, the Regional Board needed to develop a regulatory strategy to address the elevated bacterial levels. Typically, this is the development and implementation of TMDLs.

g. In 2000, Regional Board staff initiated development of TMDLs in the Big Bear Lake watershed, including the Knickerbocker Creek bacteria indicator TMDL. A sampling program was conducted from June 2002 through April 2003, on five sites along the Creek, to identify potential sources of elevated bacteria levels, if any.

h. The results of the sampling program indicated that at times, bacterial indicators exceeded the Basin Plan objectives for total and fecal coliform objectives at the sampling sites located within city boundaries. However, data from the station representing drainage from the forested area indicated that bacterial indicator concentrations complied with the Basin Plan objectives.

i. The monitoring results indicated that although bacteria were also detected outside of city boundaries, the concentrations were not high enough to cause water quality objectives to be exceeded in Knickerbocker Creek.

j. The sampling program identified the runoff from the City as a sole source of bacteria contamination in Knickerbocker Creek. Regional Board staff determined that the bacteria sources in Knickerbocker Creek could be addressed through the MS4 permit without developing a detailed TMDL.

k. Since most of the inlets to Knickerbocker Creek are from a conduit or other channelized systems from the City, the City was required to address this bacterial problem.

l. Pursuant to Provision IV, Receiving Water Limitations, Order No. R8-2002-0012 (third-term permit), the Executive Officer directed the City of Big Bear Lake to submit by September 30, 2005: (i) a plan and a schedule for identification and investigation of the sources of bacteria; (ii) a list of the BMPs that are currently being implemented and additional BMPs that must be implemented to address the exceedance

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of bacteria in Knickerbocker Creek; (iii) a plan and a schedule for implementation of additional control measures (including BMPs) to reduce or eliminate the exceedances; and (iv) a plan and a schedule for implementation of a monitoring program to evaluate the efficacy of any control measures implemented[24].

m. In compliance with the above, the City of Big Bear Lake submitted a plan and a schedule and conducted a source identification study and Phase 1 of the water quality monitoring program in 2006. The City investigated the entire sewer and septic systems located near Knickerbocker Creek and found no sanitary sewer leaks or septic system problems in the area.

n. Molecular DNA analysis confirmed that the bacteria contamination was not from human sources, but more likely from canine sources (domestic dogs).

o. In December 2007, the City purchased and installed several pet waste stations in the Knickerbocker Creek catchment areas, and installed portable toilets near parks and other recreation areas to reduce the potential for bacteria contamination in the Creek. The City believes that these control measures should address the bacteria problems in the Creek.

p. The City is currently implementing Phase 2 of the water quality monitoring program[25] to assess the effectiveness of these control measures. Three sampling locations in the Creek within City boundaries were selected based on increased frequency of high bacteria levels and availability of sustained flows.

q. This Order requires the City to continue monitoring and assessment of the effectiveness of its control measures and to submit an annual progress/status report.

7. Within the permitted area, there are six fully approved TMDLS: (a) five Middle Santa Ana River Bacterial Indicator TMDLs (MSAR TMDL); and (b) one Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions. The Basin Plan amendment incorporating the MSAR TMDLs was approved by the Regional Board on August 26, 2005 (Resolution No. R8-2005-0001), by the State Board on May 15, 2006, by the state's Office of Administrative Law on September 1, 2006, and by the USEPA on May 16, 2007.

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[24]Santa Ana Regional Water Quality Control Board, Letter from Gerard J. Thibeault, July 31, 2005, "Determination of Water Quality Standards Exceedance in Knickerbocker Creek Being Caused by MS4 Discharges in the City of Big Bear Lake".

[25]City of Big Bear Lake, January 2008, "Bacteria Monitoring Plan for Knickerbocker Creek Phase 2. January 29, 2010 (Final)

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8. The MSAR TMDLs established limits for bacterial source indicators for Santa Ana River (Reach 3) (not in San Bernardino County), Chino Creek (Reaches 1 and 2), Prado Park Lake, Mill Creek (Prado Area), and Cucamonga Creek (Reach 1).

9. The purpose of the MSAR TMDL is to assure that REC1 beneficial uses are protected. To that end, the Regional Board adopted wasteload allocations for fecal coliform and *E. coli* in the above impaired waterbodies. There are two components in the MSAR TMDL (fecal coliform and *E. coli*). The Basin Plan currently does not have an established objective for *E. coli*. Stakeholders in the Santa Ana Region have formed the Storm Water Quality Standards Task Force (SWQSTF) to evaluate USEPA's bacterial indicator recommendations and appropriate recreational beneficial use designations for waterbodies throughout the Region. The SWQSTF is expected to make recommendations for the adoption of alternative bacterial indicators such as *E.coli,* based on USEPA's "Ambient Water Quality Criteria for Bacteria - 1986". These and other recommendations of the SWQSTF are likely to result in changes to recreational water quality objectives. When and if the Basin Plan is amended to incorporate new beneficial use definitions, designations and/or bacterial standards, the MSAR TMDLs will be revised, as appropriate.

10. The MS4 dischargers are required to develop and implement BMPs designed to reduce bacterial pollution to the maximum extent practicable and to evaluate the effectiveness of those efforts towards attainment of WLAs by the compliance dates. The TMDL implementation plan envisioned short-term solutions, including monitoring, and development of a long-term plan designed to achieve compliance by the deadlines specified in the TMDL.

11. The MSAR TMDL Implementation Plan assigns responsibilities to MS4 dischargers and other stakeholders. These responsibilities include monitoring and evaluating compliance, identifying sources of impairment, and evaluating the effectiveness of BMPs and other control actions. The MSAR TMDL implementation plan assigns responsibilities for urban discharges to specific MS4 dischargers to identify sources of impairment, to propose BMPs to address those sources, and to monitor, evaluate, and revise BMPs as needed, based on the effectiveness of the BMP implementation program. These are generally considered as the short-term solutions. Specific implementation plan tasks are described in Chapter 5 of the Basin Plan and are assigned to one or more of the Permittees. Requirements of the TMDL implementation plan tasks are incorporated into this Order. A number of these implementation plan tasks are also jointly assigned to non-Permittee stakeholders. The stakeholders have established TMDL task forces to jointly implement and coordinate the TMDL implementation plan tasks.

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12. The MSAR TMDL Task Force members are listed in Table 4:

Table 4. Middle Santa Ana River Bacterial Indicator TMDL Task Force

MS4 Permittees	Non-MS4 Permittees
San Bernardino County Flood Control District (as Principal Permittee and on behalf of the Co-Permittees named in the TMDL)	Santa Ana Watershed Project Authority (SAWPA)
Corona, City of (Riverside County MS4 Permittee)	
Norco, City of (Riverside County MS4 Permittee)	US Department of Agriculture-Forest Service
Riverside, City of (Riverside County MS4 Permittee)	Milk Producers Council
Riverside, County of (Riverside County MS4 Permittee)	Chino Basin Watermaster Agricultural Pool
Riverside County Flood Control and Water Conservation District (Riverside County MS4 Principal Permittee)	Region 4 MS4 Permittees: Cities of Claremont and Pomona (pending formal agreement)

13. Requirements in the MSAR TMDLs include the following:

a. WLAs for urban discharges and for CAFOs (Concentrated Animal Feeding Operations), and LAs for agriculture and natural sources (open space and undeveloped forest land) during wet and dry weather conditions.

b. Numeric targets for fecal coliform and *E. coli*.

c. Specific implementation tasks to ensure compliance with the numeric targets, WLAs and LAs. Some of these tasks have been completed.

i. Pursuant to Task 3, the MSAR TMDL Task Force submitted a monitoring plan which was approved by the Regional Board on June 29, 2007 (Resolution No. R8-2007-0046). A revised monitoring plan that included a BMP effectiveness study was approved by the Regional Board on April 18, 2008 (Resolution No. R8-2008-0044).

ii. A BMP effectiveness study was completed as part of the watershed-wide BMP effectiveness component of the Middle Santa Ana River Water Quality Monitoring Plan (dated April 3, 2008). The results of this study will be incorporated into BMP selection criteria that will be utilized as a guide to address bacterial indicator sources within the MSAR watershed. The Riverside County Flood Control District plans to conduct a phase 2 study at its LID testing facility to evaluate the effectiveness of several LID-based BMPs, which will further guide BMP selection in the watershed.

iii. Pursuant to Task 4.1, the MSAR TMDL Task Force submitted an Urban Bacterial Indicator Source Evaluation Plan (USEP) that was approved by the Regional Board on April 18, 2008 (Resolution No. R8-2008-0044). The USEP is a phased approach. The first phase

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of the approved USEP has been completed and a report is currently under review by Regional Board staff. Several discrete sources of bacterial indicator were identified, controlled or eliminated as a result of this effort. Based on the outfall monitoring data collected to date, additional sites are identified, monitored and prioritized yearly for further evaluation. The next phase of the USEP will focus on BMP retrofit implementation to address elevated indicator bacteria from urban drainage areas flowing into Mill Creek and Cucamonga Creek.

iv. Consistent with Task 4.2, this Order requires the Permittees to revise the MSWMP to incorporate the results of the USEP and/or other studies. The MSWMP revisions shall include schedules for meeting the bacterial indicator wasteload allocations based on the schedule established in the MSAR TMDLs and the results of the USEP and/or other studies.

v. Pursuant to Task 4.4, the Permittees are required to revise the Water Quality Management Plan to incorporate BMPs as per the USEP, Task 4.1, for new development and significant redevelopment projects.

vi. Based on the results of pre-compliance evaluation monitoring[26], it has been determined that the short-term solutions discussed above are not expected to achieve the WLAs by the compliance dates. This Order requires the MSAR Permittees to develop a long-term plan (a comprehensive bacteria reduction plan, CBRP) designed to achieve compliance with the WLAs by the compliance dates.

vii. If necessary, the CBRP will be updated based on an evaluation of the effectiveness of the BMPs implemented. In the absence of an approved CBRP the WLAs become the final numeric water quality-based effluent limit that must be achieved by the compliance dates.

14. On April 21, 2006, the Regional Board adopted the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions (Resolution R8-2006-0023); the State Board approved the Basin Plan Amendment on April 3, 2007 and the Office of Administrative Law approved the Basin Plan Amendment on August 21, 2007. USEPA approved the TMDL on September 25, 2007. There were insufficient watershed and in-lake nutrient data to support development of TMDLs, load allocations, and wasteload allocations for average and/or wet hydrologic conditions; therefore the TMDL is specific to dry hydrological conditions. This Order requires the Permittees to implement the tasks identified in the implementation plan for the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions (Big Bear Lake Nutrient TMDL).

[26] Pre-compliance evaluation monitoring is monitoring conducted prior to the TMDL compliance date to assess the effectiveness of BMPs implemented in reducing pollutant(s) of concern by the compliance date.

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15. Some of the details of the implementation plan for the Bear Lake Nutrient TMDL are described below.

    a. The Big Bear Lake Nutrient TMDL includes an urban WLA for total phosphorus for dry hydrologic conditions. Phosphorus is the primary limiting nutrient in Big Bear Lake and nitrogen can be a limiting nutrient under certain conditions.

    b. Nutrient discharges to the Lake have promoted the proliferation of nuisance aquatic plants which have impacted the Lake's beneficial uses and dissolved oxygen levels.

    c. The Big Bear Lake Nutrient TMDL specifies response targets for chlorophyll a, macrophyte coverage and percentage of nuisance aquatic vascular plant species for Big Bear Lake. These response-targets provide a method to track improvements in water quality resulting from reductions in phosphorus loading.

    d. Whereas the Big Bear Lake Nutrient TMDL is applicable only to dry hydrologic conditions, the numeric targets specified in the TMDL apply to all hydrological conditions. The TMDL specifies that these targets be achieved no later than 2015 for dry hydrological conditions and no later than 2020 for all other hydrological conditions. The Regional Board will judge BMP effectiveness primarily on the basis of how well the MS4s adaptive management program does at meeting these targets for the controllable sources within their jurisdiction.

    e. The urban wasteload allocations are currently being met. This Order requires the County of San Bernardino, San Bernardino County Flood Control District and the City of Big Bear Lake (the Big Bear Lake MS4 Permittees) to continue to monitor and to develop and implement additional BMPs, if necessary.

    f. The Big Bear Lake MS4 Permittees also participate in a stakeholder effort to achieve the following Big Bear Lake Nutrient TMDL numeric targets:

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Table 5. Big Bear Lake Nutrient TMDL Numeric Targets

Indicator	Target Value[a]
Total P concentration	Annual average[b] no greater than 35 µg/L; to be attained no later than 2015 (dry hydrological conditions), 2020 (all other times)[c]
Macrophyte Coverage	30-40% on a total lake area basis; To be attained by 2015 (dry hydrological conditions), 2020 (all other times)[c,d]
Percentage of Nuisance Aquatic Vascular Plant Species	95% eradication on a total area basis of Eurasian Watermilfoil and any other invasive aquatic plant species; to be attained no later than 2015 (dry hydrological conditions), 2020 (all other times) [c,d]
Chlorophyll a concentration	Growing season[e] average no greater than 14 µg/L; to be attained no later than 2015 (dry hydrological conditions), 2020 (all other times)[c]

a Compliance with the in-lake targets to be achieved as soon as possible, but no later than the dates specified

b Annual average determined by the following methodology: the nutrient data from both the photic composite and discrete bottom samples are averaged by station number and month; a calendar year average is obtained for each sampling location by averaging the average of each month; and finally, the separate annual averages for each location are averaged to determine the lake-wide average. The in-lake open-water sampling locations used to determine the annual average are MWDL1, MWDL2, MWDL6, and MWDL9 (see 1.B.4. Implementation Task 4.2, Table 5-9a-i).

c Compliance date for wet and/or average hydrological conditions may change in response to approved TMDLs for wet/average hydrological conditions.

d Calculated as a 5-yr running average based on measurements taken at peak macrophyte growth as determined in the Aquatic Plant Management Plan (see 1.B.4. Implementation, Task 6C)

e Growing season is the period from May 1 through October 31 of each year. The open-water sampling locations used to determine the growing season average are MWDL1, MWDL2, MWDL6, MWDL9 (see 1.B.4. Implementation Task 4.2, Table 5-9a-i). The chlorophyll a data from the photic samples are average by station number and month; a growing season average is obtained for each sampling location by averaging the average of each month; and finally, the separate growing season averages for each location are averaged to determine the lake-wide average.

g. Continued compliance with the WLA will be determined by watershed modeling conducted and reported by the Big Bear Lake MS4 Permittees. By March 31, 2010, the Big Bear Lake MS4 Permittees will submit a final watershed modeling plan that is ready to be implemented and that details how compliance with the WLA will be determined and evaluated. This plan is to be implemented upon approval by the Executive Officer.

h. Where effectiveness assessments indicate WLAs are not being achieved, Big Bear Lake MS4 Permittees must develop and implement additional BMPs or demonstrate that no additional practicable BMPs are available. Compliance with the WLAs is to be achieved through the Permittees' implementation of

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BMPs in accordance with the TMDL Implementation Plans or as identified as a result of TMDL special studies approved by the Regional Board.

i. The Big Bear Lake Nutrient TMDL Implementation Plan requires the collection and evaluation of nitrogen data to determine compliance with the existing total inorganic nitrogen (TIN) objective for Big Bear Lake.

j. The Big Bear Lake Nutrient TMDL does not specify nutrient reductions from external watershed sources, which include urban discharges (WLAs), resorts and open space/forested lands (LAs). Instead, the TMDL for Dry Hydrological Conditions specifies a reduction in phosphorus from internal nutrient sources, which are lake sediment and macrophytes. External load dischargers are responsible for reducing their contributions to the internal nutrient loads.

k. On December 6, 2006, the City of Big Bear Lake and Snow Summit, Inc., signed a Memorandum of Understanding (MOU) regarding Snow Summit's storm water discharges into the City's MS4 system. The City of Big Bear Lake and Snow Summit agreed that the City has the authority to regulate storm water discharges from properties, including Snow Summit's facilities; to the extent such storm water discharges enter lands within the boundaries of the City, any waters within the jurisdiction of the City, or the City's MS4 facilities. This provides the City an additional tool to control nutrient discharges to the Lake. Responsible agencies and dischargers in the Big Bear Lake watershed have formed a Big Bear Lake TMDL Task Force. The Big Bear TMDL Task Force members are working jointly to implement requirements of the Big Bear Lake Nutrient TMDL.

l. On May 4, 2009, the Big Bear Lake TMDL Task Force submitted a revised watershed-wide monitoring plan. At the May 22, 2009 board meeting, the Regional Board approved the Big Bear Lake Watershed-wide Nutrient Monitoring Plan by adopting Resolution No. R8-2009-0043. This includes a watershed-wide monitoring plan. The Big Bear Lake In-lake Monitoring Plan was adopted on July 18, 2008 (Resolution No. R8-2008-0070). The monitoring program is designed to determine the sources of phosphorus; support the development of TMDLs applicable to other hydrologic conditions; and evaluate progress towards meeting (by the specified compliance dates) the numeric targets specified in the TMDLs.

m. The Big Bear Lake Nutrient TMDL Task Force has also submitted a lake management plan that is currently being revised based on Regional Board staff comments.

n. Based on a weight of evidence evaluation, if the numeric targets for the Lake are met through in-lake controls or other techniques, this would constitute compliance with the requirements of the TMDL implementation plan.

16. As indicated in Table 3 above, bacteria, metals and nutrients are the pollutants of concern for a majority of the waterbodies within the permitted area. One of the major sources of bacteria and nutrients is concentrated animal feeding

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operations. Dairy facilities within the region are regulated under the Regional Board's Concentrated Animal Feeding Operations (CAFO) Permit. The Regional Board enforces the CAFO Permit. The Permittees are required to identify and control urban sources of bacteria, nutrients and other pollutants within their jurisdictions, consistent with the MEP standard.

G. **New Development/Significant Redevelopment – WQMP/LID**

1. Significant numbers of development projects have taken place in San Bernardino County in the last decade. These developments have increased the area of the urbanized portion of the watershed. As development occurs, natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops and parking lots. Natural vegetated soil can both absorb rainwater and remove pollutants providing an effective natural purification process. In contrast, impervious surfaces (e.g., concrete surface) can neither absorb water nor remove pollutants, and the natural purification characteristics are lost. Urbanization generally increases storm water runoff, volume, and flow velocity. Additionally, conventional urban development significantly increases pollutant loads as the increased population density causes proportionately higher levels of vehicle emissions, vehicle maintenance wastes, municipal sewage wastes, pesticides, household hazardous wastes, lawn fertilizers, pet wastes, trash, and other anthropogenic pollutants.
2. Impacts from urbanization can especially threatens environmentally sensitive riparian areas as well as stream habitat and structure. Such areas may be much more susceptible to degradation from increased pollutant loads. Therefore, development that would otherwise have minimal impact on the environment may adversely impact a sensitive environment. These State-designated environmentally sensitive areas (ESAs) include those areas designated in the Basin Plan as supporting the following beneficial uses: (1) "Rare, Threatened, or Endangered Species (RARE)"; and (2) "Preservation of Biological Habitats of Special Significance (BIOL)".
3. Increased volumes and velocities of storm water discharges from MS4s into natural watercourses can cause stream bank erosion and physical modifications that adversely impact aquatic ecosystems and stream habitat. The collective changes in the hydrologic regime caused by development is termed hydromodification. For the permitted area, the remaining natural streams in the mountains and in lightly urbanized or undeveloped portions of the watershed are most likely to experience adverse impacts from any new development or significant redevelopment projects that are built.
4. On October 5, 2000, the State Board adopted Order No. WQ-2000-11, which required that urban runoff generated by 85th percentile storm events from specific types of development categories (priority projects) be infiltrated, filtered or treated. The essential elements of this precedential Order were incorporated into the third-term permit. The Permittees developed a model Water Quality

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Management Plan (WQMP) Guidance and Template and are currently implementing the essential elements of the approved model WQMP.

5. Recent studies have indicated that low impact development[27] LID is an effective storm water management approach that minimizes adverse impacts on storm water runoff quality and quantity resulting from urban developments. The Southern California Monitoring Coalition (SMC), including the project lead agency (the San Bernardino County Flood Control District), in collaboration with SMC member Southern California Coastal Water Research Project (SCCWRP) and the California Storm Water Quality Association (CASQA), with funding from the State Water Resources Control Board and CASQA is developing a Low Impact Development Manual for Southern California. This manual will be incorporated into the CASQA BMP Handbooks. The Permittees will incorporate, where feasible and practicable, the LID process outlined in this manual into a revised version of the WQMP.

6. This Order requires project proponents to first consider preventative and conservation techniques (e.g., preserve and protect natural features to the maximum extent practicable) prior to considering mitigative techniques (structural treatment, such as infiltration systems). The mitigative measures should be prioritized with the highest priority for BMPs that remove storm water pollutants and reduce runoff volume, such as infiltration, then other BMPs, such as harvesting and use, evapotranspiration and bio-treatment[28] should be considered. To the maximum extent practicable, these LID BMPs must be implemented at the project site. The Regional Board recognizes that site conditions, including site soils, contaminant plumes, high groundwater levels, etc., could limit the applicability of infiltration and other LID BMPs at certain project sites. Where LID BMPs are not feasible at the project site, more traditional[29], but equally effective control measures should be implemented. This Order provides for alternatives and in-lieu programs where the preferred LID BMPs are infeasible.

7. The USEPA has determined that LID can be a cost-effective and environmentally preferable approach for the control of storm water pollution and to minimize downstream impacts by mimicking pre-development hydrology and minimizing changes in site hydrology. LID techniques promote the reduction of impervious areas which may achieve multiple environmental and economic benefits in addition to enhanced water quality and supply, stream and habitat protection,

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[27] LID a set of technologically feasible and cost-effective approaches and practices that are designed to reduce runoff of water and pollutants from the site at which they are generated. By means of infiltration, evapotranspiration, and use of rainwater, LID techniques manage water and water pollutants at the source. LID and Green Infrastructure are sometimes used interchangeably. See also Attachment 4-Glossary, for definition of LID.

[28] In general, these types of BMPs utilize vegetation that promote pollutant uptake and evapotranspiration and/or natural or soil type media filtration with volume retention capacity and ability to reduce pollutant concentration.

[29] Typical engineered and/or proprietary treatment devices that capture/filter pollutants but do not contribute to maintenance of pre-development site hydrology. Examples are vortex separators, catch basin filters.

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cleaner air, reduced urban temperature, increased energy efficiency and other community benefits such as aesthetics recreation, and wildlife areas. This Order incorporates a volume capture metric based on the use of preferred LID BMPs.

8. It is recognized that LID principles are universal concepts, however, their applicability is dependent on site-specific factors such as: soil conditions including soil compaction and permeability, groundwater levels, soil contaminants (brown field development), space restrictions (in-fill projects, redevelopment projects, high density development, transit-oriented developments), etc. In the event that LID BMPs techniques, particularly infiltration, evapotranspiration, capture-use, and/or biotreatment, are not feasible at a site, alternatives and in-lieu programs are included that will address water quality/quantity concerns.

9. The model WQMP Guidance and Template provide a framework to incorporate some of the watershed protection principles into the Permittees' planning, construction and post-construction phases of priority projects. The model WQMP requires site design (including, where feasible, LID principles), source control and treatment control elements to reduce the discharge of pollutants in urban runoff. On April 30, 2004, the Regional Board approved the model WQMP Guidance and Template. The Permittees are requiring project proponents to develop and implement site-specific WQMPs. This Order requires the Permittees to verify functionality of post-construction structural BMPs prior to issuance of certificate of occupancy and to track and ensure long term operation and maintenance of post-construction BMPs in approved WQMPs.

10. An audit of each of the Permittees' storm water management programs during the third-term permit indicated a need for improved integration of the watershed protection principles, including LID techniques, specified in the WQMP into the Permittees' General Plan or related documents such as Development Standards, Zoning Codes, Conditions of Approval, Project Development Guidance, etc. It appears that many of the existing procedures, Development Standards, Ordinances and Municipal Codes may include barriers for implementation of LID techniques. This Order requires the Permittees to review and revise the Permittees' CEQA documentation, General Plan, Comprehensive or Master Plan, Municipal Codes, Subdivision Ordinances, Project Development Standards, Conditions of Approval or related documents to remove any barriers, as necessary, and within their control, for implementation of LID techniques and other requirements of this Order.

11. This Order requires the Permittees to ensure that Covenants, Conditions and Restrictions (CC&R) or other mechanisms for proper long term operation and maintenance of post-construction BMPs are carried out in perpetuity.

12. In addition to addressing post-development urban storm water quality, the WQMP includes requirements to protect environmentally sensitive areas and to address potential hydromodification issues that may result from each project. Section 2.3 of the WQMP requires identification of hydrologic conditions of concern (HCOC). An HCOC exists when a site's hydrologic regime is altered

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and there are likely to be significant[30] impacts on downstream channels and aquatic habitats, alone or in conjunction with impacts of other projects. Currently, new development and significant re-development projects are required to perform this assessment and incorporate appropriate BMPs to ensure existing hydrologic conditions are maintained. This Order requires the Permittees to implement, where feasible, LID techniques to minimize HCOC and supports the implementation of in-stream hydromodification protection and/or mitigation alternatives where appropriate.

13. Management of the impacts of urbanization on water quality, stream stability and aquatic habitats can sometimes be more effective if the techniques are implemented based on an overall watershed plan, whether done at the project site, within the neighborhood or within each municipality. During the third term permit, the Permittees initiated a watershed mapping project to develop a GIS-based map of the permitted area with the goal of identifying and developing specific action plans for protecting those segments of streams and channels that are vulnerable to impacts from urbanization.

14. This Order also requires the Permittees to develop a Watershed Action Plan to address cumulative impacts of development on vulnerable streams, preserve or restore to the maximum extent practicable the structure and function of streams in the permitted area, and protect surface water quality and groundwater recharge areas. The Watershed Action Plan should integrate hydromodification and water quality management strategies with land use planning policies, ordinances, and plans within each jurisdiction.

15. Pending approval of a Watershed Action Plan, the Permittees are required to address the impacts of urbanization as required under the approved model WQMP by requiring project proponents to develop and implement project-specific WQMPs.

16. If not properly designed and maintained, the structural treatment control BMPs could create a nuisance and/or habitat for vectors[31] (e.g., mosquitoes and rodents). Third term permit required the Permittees to closely collaborate with the local vector control agencies during the development and implementation of such treatment systems. The Permittees should continue these collaborative efforts with the vector control agencies to ensure that treatment control systems do not become a nuisance or a potential source of pollutants. The requirements specified in this Order include identification of responsible agencies for maintaining the systems and for providing funding for operation and maintenance.

17. If not properly designed and maintained, groundwater infiltration systems could also adversely impact groundwater quality. Restrictions placed on urban runoff

[30] It is expected that the current HCOC mapping effort and stream/risk characterization effort will define what should be considered as significant impact or stream vulnerability to hydromodification on a watershed basis.

[31] Managing Mosquitoes in Stormwater Treatment Devices, Marco E. Metzger, University of California Davis, Division of Agriculture and Natural Resources, Publication 8125.

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infiltration in this Order (Section XI.D.8) are based on recommendations provided by the USEPA Risk Reduction Laboratory. The Permittees should continue to work closely with the water districts and water conservation districts to ensure groundwater protection.

H. **Municipal Inspection Programs**

1. The Permittees are required to conduct inspections of construction sites, industrial facilities, and commercial establishments. An evaluation of the Permittees' inspection programs during the third-term permit indicated a wide range of compliance and non-compliance with the inspection requirements. In many instances, the facilities' return to compliance was not properly documented. This Order includes requirements for a more effective inspection program and includes a performance measure, time to return to compliance, as a metric for program effectiveness.
2. During the third term, the Permittees initiated development of a risk-based prioritization scheme to prioritize facilities for inspections. In the absence of an approved risk-based prioritization scheme, the Permittees are required to use the prioritization methodology specified in the third-term permit. Upon approval of the risk-based prioritization scheme, the Permittees are required to utilize that system to prioritize their inspections.

I. **Illegal Discharges/Illicit Connections**

1. Illegal discharges to the MS4s could contribute to storm water and other surface water contamination. During the second term permit, the Permittees completed a reconnaissance survey of their open channels and underground storm drains to detect and eliminate any illicit connections (undocumented or unpermitted connections to the MS4s). The Permittees have trained their staff on illegal discharge surveillance/cleanup procedures. Audits conducted during the third-term permit indicated that this program element is generally carried out through complaint response. This Order requires each Permittee to revise this program element based on the Center for Watershed Protection's Illegal Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments.

J. **Technology-Based Effluent Limitations (Not Applicable)**

K. **Non-storm Water/De-Minimus Discharges**

1. The MS4s generally convey non-storm water flows such as irrigation runoff, runoff from non-commercial car washes, runoff from miscellaneous washing and cleaning operations, and other nuisance flows generally referred to as de-minimus discharges. Federal regulations, 40 CFR Part 122.26(d)(2)(i)(B), prohibit the discharge of non-storm water containing pollutants into the MS4s and to Waters of the U.S. unless they are regulated under a separate NPDES permit or are exempt as indicated in Effluent Limitations and Discharge Specifications,

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Section V.A of this Order. On March 24, 2009, the Regional Board adopted Order No. R8-2009-0003, to address de-minimus types of discharges. The Permittees need not get coverage under the de-minimus permit for the types of discharges listed under Section V.B, as long as they are in compliance with the conditions specified in this Order and the substantive requirements of Order No. R8-2009-0003.

L. **Water Quality-Based Effluent Limitations (WQBELs) and TMDL WLA**

1. 40 CFR 122.44(d) requires that permits include WQBELs to attain and maintain applicable numeric and narrative water quality criteria to protect the beneficial uses of the receiving waters. Where numeric water quality criteria have not been established, 40 CFR 122.44(d) specifies that WQBELs may be established using USEPA criteria guidance under CWA section 304(a), proposed state criteria or a state policy interpreting narrative criteria supplemented with other relevant information, or an indicator parameter. In *Defenders of Wildlife, et al* v. *Browner,* No. 98–71080 (9th Circuit, October 1999). The Court held that the CWA does not require "strict compliance" with State water quality standards for MS4 permits under section 301(b)(1)(C), but that at the same time, the CWA does give EPA discretion to incorporate appropriate water quality-based effluent limitations under another provision, CWA section 402(p)(3)(B)(iii). 40 CFR 122.44(k)(3) allows the use of BMPs to control or abate the discharge of pollutants when numeric effluent limitations are infeasible or when practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA. The legislative history and the preamble to the federal storm water regulations indicated that Congress and the USEPA were aware of the difficulties in regulating urban and storm water runoff solely through traditional end-of-pipe treatment. It is the Regional Board's intent to require the Permittees to implement best management practices consistent with the MEP standard in order to support attainment of water quality standards. This Order includes receiving water limitations based on applicable water quality standards; it prohibits the creation of nuisance and requires the reduction of water quality impairment in receiving waters. The Permit includes a procedure for determining whether storm water discharges are causing or contributing to exceedances of receiving water limitations and for evaluating whether the MSWMP must be revised to include additional or more effective BMPs designed to meet water quality standards. The Order establishes an iterative process to determine compliance with the receiving water limitations.

2. To support attainment of water quality standards, consistent with MEP, this Order requires the Permittees to implement a number of management practices and an iterative process to ensure that water quality standards are achieved. The Permittees are required to:

   a. Implement BMPs at all their facilities and for all their activities,

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b. Require BMPs, including, where appropriate, LID techniques, to be implemented at new and re-development project sites prior to accepting discharge from these sites into their MS4s,

c. Implement and annually evaluate the MSWMP and each Permittee's LIP for effectiveness in reducing pollutants in urban and storm water runoff, and

d. Perform monitoring and reporting to determine the adequacy of BMPs within the permitted area and to determine the pollutants of concern based on comparisons of monitoring data with the applicable water quality standards.

3. Federal regulations (40 CFR 122.44(d)(1)(vii)(B) require inclusion of effluent limits that are "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA." Consistent with this requirement, this Order includes a process for developing a BMP-based approach, which, if adopted by the Regional Board prior to the compliance date(s) specified in the associated TMDL Implementation Plan, shall become the final water quality-based effluent limitation(s). Permittees are required to submit a BMP-based comprehensive plan (comprehensive plan) describing the proposed BMPs and the documentation demonstrating that the BMPs are expected to attain the WLAs by the compliance dates when implemented. Once the Regional Board approves this comprehensive plan, this Order will be amended to include the comprehensive plan as the final water quality-based effluent limit that is consistent with the WLAs. If the Regional Board does not approve the comprehensive plan prior to the compliance date(s), the WLAs will become the final water quality-based effluent limits on the applicable compliance date and will remain in effect until a BMP comprehensive plan is approved by the Regional Board. The comprehensive plan will be updated, as necessary, to reflect evaluations of the effectiveness of the BMPs, including evaluations presented in the annual reports. The WLAs for Big Bear Lake Nutrient TMDLs are currently being achieved. The Permittees in the Big Bear Lake area are required to continue to implement BMPs (specific tasks identified in the Big Bear Lake Nutrient TMDL Implementation Plan) and to monitor to ensure continued compliance with the WLAs.

4. If water quality standards in the impaired receiving waters are met through implementation of appropriate control measures, this would constitute compliance with the effluent limits.

5. Maximum daily concentration limits are also included for de-minimus types of discharges from Permittee owned and/or operated facilities and activities and for total dissolved solids and total inorganic nitrogen for dry weather discharges.

M. Water Quality Control Plan (Basin Plan)

1. The Regional Board adopted a revised Water Quality Control Plan for the Santa Ana River Basin (hereinafter Basin Plan) that became effective on January 24, 1995. The Basin Plan designates beneficial uses, establishes water quality

objectives, and contains implementation programs and policies to achieve those objectives for all waters in the Santa Ana Region addressed through the Plan.

2. More recently, the Basin Plan was amended significantly to incorporate revised boundaries for groundwater sub-basins, now termed "management zones", new nitrate-nitrogen and TDS objectives for the new management zones, and new nitrogen and TDS management strategies applicable to both surface and ground waters. This Basin Plan Amendment (R8-2004-0001) was adopted by the Regional Water Board on January 22, 2004. The State Water Resources Control Board (State Water Board) and Office of Administrative Law (OAL) approved Order No R8-2004-0001 on September 30, 2004 and December 23, 2004, respectively. The U.S. Environmental Protection Agency approved the surface water quality standards and related provisions of Order R8-2004-0001 on June 20, 2007. Order R8-2004-0001 includes TDS/TIN limits for direct dry weather discharges into surface waters within the permitted area based on the objectives specified in Table 4-1 of the Basin Plan, as amended. Storm water was considered to be an insignificant source for nitrogen/TDS in groundwater. These amendments were all incorporated into and updated in a single revised basin plan in February 2008.

3. In addition, the Basin Plan implements State Water Resources Control Board (State Water Board) Resolution No. 88-63, which established state policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic water supply. Beneficial uses recognized in the Basin Plan for surface waters in the permitted area are as follows:

   a. Municipal and Domestic Supply,
   b. Agricultural Supply,
   c. Industrial Service Supply,
   d. Industrial Process Supply,
   e. Groundwater Recharge,
   f. Hydropower Generation,
   g. Water Contact Recreation,
   h. Non-contact Water Recreation,
   i. Warm Freshwater Habitat,
   j. Limited Warm Freshwater Habitat,
   k. Cold Freshwater Habitat,
   l. Preservation of Biological Habitats of Special Significance,
   m. Wildlife Habitat,
   n. Rare, Threatened or Endangered Species, and
   o. Spawning, Reproduction, and Development

   The existing and potential beneficial uses of groundwater that could be impacted by the discharge of urban and storm water runoff within the permitted area include the following:

   a. Municipal and Domestic Supply,
   b. Agricultural Supply,

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c. Industrial Service Supply, and
d. Industrial Process Supply

4. The Basin Plan also incorporates by reference all State Board water quality control plans and policies including the 1990 Water Quality Control Plan for Ocean Waters of California (Ocean Plan) and the 1974 Water Quality Control Policy for Enclosed Bays and Estuaries of California (Enclosed Bays and Estuaries Plan). This Order implements the Basin Plan and other statewide plans and policies incorporated into the Basin Plan.

N. **National Toxics Rule (NTR) and California Toxics Rule (CTR)**

Regional Board believes that compliance with water quality standards through implementation of best management practices is appropriate for regulating urban and storm water runoff. EPA articulated this position on the use of BMPs in storm water permits in the policy memorandum entitled, "Interim Permitting Approach for Water Quality-Based Effluent Limitations In Storm Water Permits" (61 FR 43761, August 9, 1996).[32] NTR and CTR are blanket water quality criteria that apply to all surface water discharges. Water quality objectives specified in the Basin Plan are local numeric and narrative objectives that may be more stringent than the national or statewide water quality criteria.

O. **State Implementation Policy (SIP) (Not Applicable)**

See Section N., above.

P. **Compliance Schedules and Interim Requirements**

The Basin Plan contains schedules for achieving compliance with wasteload allocations for MSAR TMDLs and the Big Bear Lake Nutrient TMDLs. This Order requires the Permittees within these watersheds to comply with those time schedules for various deliverables as specified in the approved implementation plans. Consistent with the State Board's Compliance Schedule Policy, Resolution No. 2008-0025, this Order incorporates interim and final effluent limits, where appropriate. Additionally, since the final TMDL compliance dates are outside the term of this permit, this Order also requires the Permittees to monitor and report the effectiveness of BMPs implemented to evaluate progress towards attainment of TMDL WLAs by the time schedules specified in the implementation plans.

Q. **Antidegradation Policy**

40 CFR 131.12 requires that State water quality standards include an antidegradation policy consistent with the federal policy. The State Water Board established California's antidegradation policy in State Board Resolution No. 68-16. Resolution No. 68-16 incorporates the federal antidegradation policy where the

[32]See discussions on Wet Weather Flows in the Federal Register/Vol. 65, No. 97/Thursday, May 18, 2000/Rules and Regulations

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federal policy applies under federal law. Resolution No. 68-16 requires that existing quality of waters be maintained unless degradation is justified based on specific findings. The Regional Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. As discussed in detail in the Fact Sheet, the permitted discharges are consistent with the antidegradation provisions of 40 CFR 131.12 and State Board Resolution No. 68-16.

R. **Anti-Backsliding**

Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations of 40 CFR 122.44(*l*) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous Order. Therefore this Order conforms with the anti-backsliding requirements of the CWA.

S. **Public Education/Participation**

1. Public participation during the development of urban runoff management programs and implementation plans is necessary to ensure that all stakeholder interests and all applicable control measures are considered. In addition, the storm water regulations require public participation in the development and implementation of the storm water management program. As such, the Permittees are required to solicit and consider all comments received from the public and submit copies of the comments to the Executive Officer of the Regional Board with the annual reports. In response to public comments, the Permittees may modify reports, plans, or schedules prior to submittal to the Executive Officer.

2. Urban runoff can contain pollutants from privately owned and operated facilities such as residences, businesses and commercial establishments, and from public and private institutions. A successful storm water management program should include the participation and cooperation of public entities, private businesses, and public and private institutions. The MSWMP recognizes public education as a critical element. As the population increases in the permitted area, it will be even more important to continue to educate the public regarding the impact of human activities on the quality of urban runoff.

3. In addition to the Regional Board, a number of other stakeholders are involved in the management of the water resources of the Region. These include, but are not limited to, the incorporated cities in the Region, Publicly Owned Treatment Works, Orange, Riverside, and San Bernardino counties, and the Santa Ana Watershed Project Authority and its member agencies. The entities listed in Attachment 3 are considered as potential dischargers of urban runoff in the permitted area. It is expected that these entities will also work cooperatively with the Permittees to manage urban runoff. The Regional Board, pursuant to 40 CFR 122.26(a), has the discretion and authority to require non-cooperating

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entities to participate in this Order, or to issue individual discharge permits to these entities.

4. Cooperation and coordination among the stakeholders (regulators, Permittees, the public, and other entities) are critical to optimize the use of finite public resources, and to ensure economical management of water quality in the Region. Recognizing this fact, this Order focuses on watershed management and seeks to integrate the programs of the stakeholders, especially the Permittees under the Orange, Riverside, and San Bernardino County MS4 permits within the Santa Ana Watershed.
5. Public education is an important aspect of every effective urban runoff management program and can promote changes in behavior at a societal level. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions affect receiving water quality and how adverse effects can be minimized.
6. Some urban runoff issues, such as general education and training, can be effectively addressed on a regional basis. Regional approaches to urban runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs. In particular, the counties of San Bernardino, Riverside and Orange and the municipalities within these counties are encouraged to cooperatively work together and generate a unified education and training program.

T. Monitoring and Reporting

1. 40 CFR 122.48 requires that all NPDES permits specify requirements for recording and reporting monitoring results. Sections 13267 and 13383 of the CWC authorize the Regional Board to require technical and monitoring reports. The Monitoring and Reporting Program establishes monitoring and reporting requirements to implement federal and State requirements.
2. An effective monitoring program should characterize urban runoff, identify problem areas, determine the impact of urban runoff on receiving waters and assess the effectiveness of BMPs. The Principal Permittee administers and conducts the storm water monitoring program for the Permittees. The third-term Permit includes only wet weather monitoring of MS4 outfalls and receiving waters.
3. The Regional Board and the Permittees recognize the importance of watershed management initiatives and regional planning and coordination in the development and implementation of programs and policies related to water quality protection, including urban runoff and TMDL programs. A number of such efforts are underway where the Permittees are active participants, including the Storm Water Quality Standards Task Force, the Middle Santa Ana River Watershed TMDL Task Force, and the Big Bear TMDL Task Force. This Order encourages continued participation in such programs. Furthermore, this Order recognizes that some of these planning efforts may result in significant changes

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to the Basin Plan. If this occurs, the Regional Board may reopen the permit to modify applicable terms and conditions through a public hearing process. In addition, the Regional Board also recognizes that in certain cases it may be necessary and appropriate to fund regional water quality monitoring programs by reallocating funds from lower priority local monitoring programs. The Executive Officer is authorized to approve, after public notification and consideration of all comments received, changes to the watershed management initiatives, regional planning and coordination activities and regional monitoring programs. If the Executive Officer receives any significant comments during the public notification process that cannot be resolved, it shall be scheduled for a public hearing during a regularly scheduled Board meeting. To improve the effectiveness of adopted TMDLs and TMDLs that are expected to be adopted in the near future, this Order requires the Permittees to develop an Integrated Watershed Monitoring Plan that will comprehensively integrate the various urban run-off related monitoring programs, TMDLs and program effectiveness assessments. The Monitoring and Reporting Program is provided in Attachment 5.

4. The Stormwater Monitoring Coalition[33], with technical guidance from the Southern California Coastal Water Research Project prepared "Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California", August 2004 Technical Report No. 419. This report indicated that "...the lack of mass emissions stations in the inland counties hampers their ability to estimate the proportional contribution of these inland areas to cumulative loads downstream." Accordingly, the Monitoring and Reporting Section requires the establishment of urban discharge mass emission stations. An integrated Watershed Monitoring Plan should address any shortcomings in the overall monitoring programs and avoid duplicative efforts within the same watershed.

5. The Storm Water Monitoring Coalition, in partnership with the Southern California Coastal Water Research Project, is conducting a Regional Bioassessment Monitoring effort. This Order requires the Permittees to continue their participation in this regional effort.

U. Standard and Special Provisions

Standard Provisions, reporting requirements, and notifications which apply to all NPDES permits are specified in Federal NPDES Regulation 40 CFR122.41, and additional conditions applicable to specified categories of permits are specified in 40 CFR 122.42. The discharger must comply with all standard provisions and with those additional conditions that are applicable under 40 CFR 122.42.

[33] The Stormwater Monitoring Coalition consists of representatives from the Counties of Ventura, Los Angeles, Orange, San Bernardino, Riverside, and San Diego, the Cities of Long Beach and Los Angeles, the SWRCB, CRWQCB Regions 4, 8, and 9, the USEPA, and Caltrans.

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V. **Notification of Interested Parties**

The Regional Board has notified the dischargers and interested agencies and persons of its intent to prescribe Waste Discharge Requirements for the discharge and has provided them with an opportunity to submit their written comments and recommendations. Details of notification are provided in the Fact Sheet of this Order.

W. **Consideration of Public Comment**

The Regional Board has notified the Permittees, all known interested parties, and the public of its intent to issue waste discharge requirements for this discharge and has provided them with an opportunity to submit their written views and recommendations. The Regional Board, in a public meeting, heard and considered all comments pertaining to the discharge and the requirements of this Order.

X. **Alaska Rule**

On March 30, 2000, USEPA revised its regulation that specifies when new and revised State and Tribal water quality standards (WQS) become effective for CWA purposes (40 CFR 131.21, 65 FR 24641, April 27, 2000). Under the revised regulation (also known as the Alaska rule), USEPA must approve new and revised standards submitted to USEPA after May 30, 2000 before being used for CWA purposes. The final rule also provides that standards already in effect and submitted to USEPA by May 30, 2000 may be used for CWA purposes, whether or not approved by USEPA.

Y. **Compliance with CZARA**

The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), Section 6217(g), requires coastal states with approved coastal zone management programs to address non-point source pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This Order addresses the management measures required for the urban category. Compliance with requirements specified in this Order relieves the Permittees of developing a non-point source plan, for the urban category, under CZARA. .

Z. **Stringency Requirements for Individual Pollutants (Not Applicable)**

PERMIT REQUIREMENTS:

IT IS HEREBY ORDERED that the Permittees, in Order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Clean Water Act, as amended, and the regulations and guidelines adopted thereunder, shall comply with the following:

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III. PERMITTEE RESPONSIBILITIES

A. Responsibilities of the Principal Permittee:

1. The Principal Permittee shall be responsible for managing the overall storm water program and shall:

   a. Conduct chemical, biological, bacteriological water quality and other monitoring as required by this Order and any additional monitoring directed by the Executive Officer.

   b. Prepare and submit to the Executive Officer of the Regional Board, unified reports, plans, and programs necessary to comply with this Order.

   c. Coordinate and conduct Management Committee meetings as specified in the MSWMP.

   d. Coordinate permit activities and participate in any subcommittees formed as necessary, to coordinate compliance activities with this Order.

   e. Provide technical and administrative support and inform the Co-Permittees of the progress of other pertinent municipal programs, pilot projects, research studies, and other information to facilitate implementation of Co-Permittees' storm water program.

   f. Coordinate the implementation of area-wide storm water quality management activities such as the monitoring program, public education, pollution prevention, etc.

   g. Gather and disseminate information on the progress of statewide municipal storm water programs and evaluate the information for potential use in the execution of this Order.

   h. Monitor the implementation of the plans and programs required by this Order and determine their effectiveness in attaining water quality standards.

   i. Coordinate with the Regional Board on activities pertaining to implementation of this Order, including the submittal of all reports, plans, and programs as required under this Order.

   j. Develop and implement mechanisms, performance standards, design standards, etc., and assist in the consistent implementation of BMPs to the maximum extent practicable among the Permittees.

   k. Cooperate in watershed management programs and regional and/or statewide monitoring programs.

   l. Solicit and coordinate public input for any proposed major changes to areawide storm water management programs (MSWMP) and implementation plans.

   m. In collaboration with the Co-Permittees, develop guidelines for defining expertise and competencies of storm water program managers and inspectors

and develop and submit for approval a training program for various positions in accordance with these guidelines

n. Within 18 months of permit adoption, the Principal Permittee shall coordinate a review of areawide documents with the Co-Permittees to determine the need for update or revisions and establish a schedule for those revisions. These documents include but are not limited to the Enforcement Consistency Guide, the Municipal Activities Pollution Prevention Strategy, Water Quality Management Plan Guidance and Template, BMP brochures and other areawide documents.

o. Within 6 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, shall develop and submit an area-wide model Local Implementation Plan (LIP) to the Executive Officer of the Regional Board. The submitted model LIP shall be deemed acceptable to the Regional Board if the Executive Officer raises no written objections within 30 days of submittal. The model LIP should describe each program element per the MSWMP; the departments and personnel responsible for its implementation; applicable standard operating procedures, plans, policies, checklists, and drainage area maps; and tools and resources needed for its implementation. The model LIP should also establish internal and external reporting and notification requirements to ensure accountability and consistency. The model LIP should also describe the mechanisms, procedures, and/or programs whereby the Permittees' individual LIPs will be coordinated through the WAP.

2. In addition, the activities of the Principal Permittee shall include but not be limited to the following for MS4 systems owned or operated by the Principal Permittee:

   a. Within 18 months of adoption of this Order, the Principal Permittee shall develop and implement a Principal Permittee-specific LIP, based on the areawide model LIP. A copy of the LIP, signed by the Chair of the Board of Directors for the Principal Permittee, shall be submitted to the Executive Officer within 18 months of the adoption of this Order.

   b. Take appropriate enforcement actions necessary to ensure compliance with Water Quality Management Plans, ordinances, implementation plans, and other applicable plans and policies.

   c. Inspect, clean, and maintain the MS4 systems within its jurisdiction consistent with the MEP standard.

   d. Review Water Quality Management Plans or other post-construction management plans requiring local agency permits.

   e. Prior to accepting permanent connections to its MS4 from entities outside its jurisdictional authority, the Principal Permittee shall notify the entities in writing of the General Stormwater Permit (Order No. 2009-0009-DWQ) post-construction standards and the regulatory requirements for control of pollutants in MS4 discharges (including relevant requirements from the MSWMP and WQMP), where feasible, and consistent with the MEP standard. A WQMP

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approved by the Co-Permittee with jurisdictional authority may constitute compliance with the General Construction Permit post-construction requirements[34].

f. Review and revise, if necessary, policies and ordinances necessary to establish and maintain adequate legal authority, as required by the federal storm water laws and regulations.

g. Respond to or arrange for responding to emergency situations such as accidental spills, leaks, illicit connections/illegal discharges, etc., to prevent or to reduce the discharge of pollutants to storm drain systems and Waters of the U.S.

h. Track, monitor, and keep training records of all personnel involved in the implementation of the Principal Permittee's LIP.

i. Implement management programs, monitoring programs, and related plans as required by this Order.

j. Solicit and coordinate public input for any proposed major changes to its LIP, the MSWMP, and/or Model WQMP, as appropriate.

B. Responsibilities of the Co-Permittees

1. Within 18 months of adoption of this Order, each Co-Permittee shall develop and implement an LIP for its jurisdiction. The LIP shall describe the Co-Permittee's legal authority, its ordinances, policies and standard operating procedures; identify departments and personnel for each task and needed tools and resources. The LIP shall establish internal departmental coordination and reporting requirements to ensure accountability and consistency. Within 18 months from the adoption of this Order, each Co-Permittee shall adopt a Permittee-specific LIP, based on the areawide model LIP. The LIP shall have the written approval of the Permittee's City Manager or County Supervisor prior to its implementation and shall be updated on an as needed basis. Each Permittee's approved LIP shall be submitted, in electronic format, to the Executive Officer within 18 months of the adoption of this Order.

2. Each Co-Permittee shall be responsible for managing the storm water program within its jurisdiction and shall:

   a. Implement all applicable program elements including but not limited to the management programs, monitoring programs, implementation plans and appropriate BMPs outlined in the MSWMP and the LIP within each respective jurisdiction, and take such other actions as may be necessary to meet the maximum extent practicable (MEP) standard.

   b. Review and revise policies and ordinances necessary to establish and maintain adequate legal authority as stated in Section VI.1 of this Order and

[34] The State General Construction Permit Order No. 2009-0009-DWQ Section XIII

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as required by the federal storm water regulations, 40CFR, Part 122.26(d)(2)(i)(A-F).

c. Obtain public input for any proposed major changes to its storm water management program and implementation plans.

d. Inspect, clean, and maintain the MS4 systems within its jurisdiction.

e. Maintain up-to-date GIS-based MS4 facility maps. Annually review these maps and, if necessary, submit revised maps to the Principal Permittee for integration with the HCOC mapping and with the information required for preparation of the Annual Report.

f. Prepare and submit to the Principal Permittee in a timely manner all required information necessary to develop a unified Annual Report for submittal to the Executive Officer of the Regional Board.

3. The Co-Permittees' activities shall include, but not be limited to, the following:

a. Designate at least one representative to the Management Committee and attend at least 7 out of the 8 Management Committee meetings per year. The Principal Permittee shall be notified immediately, in writing, of any changes to the designated representative to the Management Committee.

b. Conduct, and/or coordinate with the Principal Permittee to conduct, any surveys and/or characterizations needed to identify pollutant sources from specific drainage areas.

c. Review and comment on all plans, strategies, management programs, monitoring programs, as developed by the Management Committee, the Principal Permittee or any subcommittee to comply with this Order.

d. Participate in committees or subcommittees formed to address storm water related issues to comply with this Order.

e. Respond to or arrange for responding to emergency situations such as accidental spills, leaks, illegal discharges/illicit connections, etc. to prevent or reduce the discharge of pollutants to storm drain systems and Waters of the U.S.

f. Pursue enforcement actions as necessary within its jurisdiction for violations of storm water ordinances, prohibitions on illicit connections and illegal discharges, and other elements of its storm water management program.

g. Track, monitor, and keep training records of all personnel involved in the implementation of its LIP.

h. Track and monitor operation and maintenance of post-construction BMPs installed in areas within each Permittee's jurisdiction.

i. Prior to accepting permanent connections to its MS4 from entities outside its jurisdictional authority, the co-Permittee shall notify these entities in writing of General Stormwater Permit post-construction standards and the regulatory requirements for control of pollutants in MS4 discharges (including relevant

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requirements from the MSWMP and WQMP), where feasible, and consistent with the MEP standard. A WQMP approved by the Co-Permittee with jurisdictional authority may constitute compliance with the General Construction Permit post-construction requirements[35]. The Permittees will also send these notifications to the Regional Board.

j. Track and monitor operation and maintenance of post-construction BMPs installed in areas within each Permittee's jurisdiction.

C. Implementation Agreement

1. As needed, the Permittees shall evaluate the storm water management structure and the Implementation Agreement and determine the need for any revision. The annual report shall include the finding of any such review and provide a schedule if revisions are planned. The Implementation Agreement shall be reviewed and revised, if necessary, to include any cities that were not signatories to this agreement or other non-traditional entities that own or operate conveyance systems within the permitted area. See Attachment 3. If the Implementation Agreement is revised, a copy of the signature page and any revisions to the Agreement shall be included in the annual report.

IV. DISCHARGE PROHIBITIONS

A. In accordance with the requirements of 40 CFR 122.26(d)(2)(i)B) and 40 CFR 122.26(d)(2)(i)(F), the Permittees shall prohibit illegal connections and illicit discharges (non-storm water) from entering municipal separate storm sewer systems unless such discharges are either authorized by a NPDES permit or Waste Discharge Requirements issued by the Regional Board, or not prohibited in accordance with Section V, below.

B. The discharge of Urban Runoff from Permittees' municipal separate storm sewer systems, containing pollutants, including trash and debris that have not been reduced to the maximum extent practicable, to waters of the U. S. is prohibited.

C. The Permittees shall effectively prohibit the discharge of non-storm water into the MS4s unless authorized by a separate NPDES permit, granted a waiver or as otherwise specified in Section V, below.

D. Non-storm water discharges from Permittee activities into Waters of the U.S. are prohibited unless the non-storm water discharges are permitted by a NPDES permit, granted a waiver, or are as otherwise specified in Section V, below.

E. Discharges from the MS4s shall be in compliance with the discharge prohibitions contained in Chapter 5 of the Basin Plan.

F. Discharges into and from the MS4s in a manner causing, or threatening to cause a condition of pollution, contamination, or nuisance, as that term is defined in Section 13050 of the Water Code, into waters of the State are prohibited.

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G. The discharge to Waters of the U.S., of any substances in concentrations toxic to animal or plant life is prohibited.

H. The discharge to Waters of the U.S., of any radiological, chemical, or biological warfare agent or high level radiological waste is prohibited.

V. EFFLUENT LIMITATIONS AND DISCHARGE SPECIFICATIONS

For purposes of this Order, a discharge may include storm water or other types of discharges identified below.

A. **Authorized Discharges:**

The discharges identified below need not be prohibited by the Permittees except if identified by the Permittees or the Executive Officer as a significant source of pollutants or as a significant vehicle that may cause pollutants to migrate to Waters of the U.S. The MSWMP shall include public education and outreach activities directed at reducing these discharges even if they are not substantial contributors of pollutants to the MS4s and/or the receiving waters.

1. Discharges composed entirely of storm water;
2. Air conditioning condensate;
3. Irrigation water. These discharges shall be minimized through public education and water conservation efforts. Also see Section X.E, Residential Program, and Section C., Nonpoint Source Discharges, below;
4. Passive foundation drains[36];
5. Passive footing drains[37];
6. Water from crawl space pumps[38];
7. Non-commercial vehicle washing, ,e.g. residential car washing (excluding engine degreasing) and car washing for fundraisers by non-profit organizations[39];
8. Dechlorinated swimming pool discharges (cleaning wastewater and filter backwash shall not be discharged into the MS4s or to Waters of the U.S.)
9. Diverted stream flows[40];

[36]The discharge is allowed only if the source water drained from the foundation is stormwater or uncontaminated groundwater. Discharges from contaminated groundwater may require coverage under the General Groundwater Cleanup Permit (Order No. R8-2007-0008, NPDES Permit No CAG918001) or its latest version.

[37]Only uncontaminated discharge is allowed. Otherwise, coverage under Order No. R8-2007-0008 may be required.

[38]The discharge is allowed only if it is uncontaminated; otherwise permit coverage under the General Permit for Discharges from Utility Vaults and Underground Structures, Water Quality Order No. 2006-0008-DWQ (NPDES No. CAG990002) may be required.

[39]Charity car washes should be limited to bona-fide 501 agencies.

[40]Diversion of stream flows that encroach into Waters of the U.S. requires a 404 permit from the U.S. Army Corps of Engineers and a 401 Water Quality Certification from the Regional Board. Stream diversion that requires active pumping may also require coverage under the De Minimus Permit, Order No. R8-2009-0003.

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10. Rising ground waters and natural springs[41];
11. Uncontaminated ground water infiltration as defined in 40 CFR 35.2005 (20) and uncontaminated pumped groundwater,
12. Flows from riparian habitats and wetlands;
13. Emergency fire fighting flows (i.e., flows necessary for the protection of life and property do not require BMPs and need not be prohibited. However, appropriate BMPs to reduce the discharge of pollutants consistent with the MEP standard must be implemented when they do not interfere with health and safety issues.
14. Waters not otherwise containing wastes as defined in California Water Code Section 13050 (d), and
15. Other types of discharges identified and recommended by the Permittees and approved by the Regional Board.
16. The Permittees must evaluate the authorized discharges listed above to determine if any are a significant source of pollutants to the MS4, and notify the Executive Officer if any are a significant source of pollutants to the MS4. If the Permittee determines that any are a source of pollutants that exceed water quality standards, the Permittee(s) shall either:
    a. Prohibit the discharge from entering the MS4; or
    b. Authorize the discharge category and ensure that "Source Control BMPs" and Treatment Control are implemented to reduce or eliminate pollutants resulting from the discharge; or
    c. Require or obtain coverage under a separate Regional Board or State Board permit for discharge into the MS4.

B. **Discharge Specifications/De-Minimus Discharges from Permittee Owned and/or Operated Facilities/Activities:**

1. The Permittees shall prohibit the following categories of non-storm water discharges (de minimus discharges) into Waters of the U.S. from Permitttee-owned and/or operated facilities/activities unless the stated conditions are met. The de minimus types of discharges listed in the General De Minimus Permit shall be in compliance with the Regional Board's General De Minimus Permit for Discharges to Surface Waters, Order No. R8-2009-0003, NPDES No. CAG 998001:
    a. Discharges from potable water sources, including water line flushing, superchlorinated water line flushing; discharges resulting from the maintenance of potable water supply pipelines, tanks, reservoirs, etc.; discharges from potable water supply systems resulting from initial system startup, routine startup, sampling activities, system failures, pressure release, etc.; fire hydrant system testing or flushing; and hydrostatic test water: Planned discharges shall be dechlorinated to a

[41]Discharge of rising ground water and natural springs into surface water is only allowed if the groundwater is uncontaminated. Otherwise, coverage under Order No. R8-2007-0008 may be required.

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concentration of 0.1 ppm[42] or less, pH adjusted if necessary, and volumetrically and velocity controlled to prevent hydrologic conditions of concern in receiving waters.

b. Dechlorinated swimming pool discharges: Dechlorinated to a concentration of 0.1 ppm[43] or less, pH adjusted and reoxygenated if necessary, and volumetrically and velocity controlled to prevent hydrologic condition of concern in receiving waters. Swimming pool cleaning wastewater and filter backwash shall not be discharged to the MS4s or to Waters of the U.S.

c. Construction dewatering wastes[44] and dewatering wastes from subterranean seepage[45], except for discharges from utility vaults: The following limits shall be met at approved monitoring locations. The maximum daily concentration limit for total suspended solids shall not exceed 75 mg/l, sulfides 0.4 mg/l, oil and grease15 mg/l, total petroleum hydrocarbons 0.1 mg/l; the pH of the discharge shall be within 6.5 to 8.5 pH units and there shall be no visible oil and grease in the discharge.

d. Discharges from facilities that extract, treat and discharge water diverted from waters of the U.S[46]. These discharges shall meet the following conditions: (1) The discharges to Waters of the U.S. must not contain pollutants added by the treatment processes or pollutants in greater concentration than the influent; (2) The discharge must not cause or contribute to a condition of erosion; (3) The extraction and treatment must be in compliance with Section 404 of the Clean Water Act; and (4) Conduct monitoring in accordance with Monitoring and Reporting Program attached to this Order.

2. Discharges from lawn, greenbelt and median watering and other irrigation runoff[47] from Permittee's facilities shall be minimized through water conservation efforts. Also see Section X.E, Residential Program

3. Table 4-1 of the Basin Plan incorporates TDS/TIN[48] limits for direct discharges into surface waters in specified management zones within the Santa Ana Region. Permittees discharging to those receiving waters shall comply with the following for dry weather conditions.

   a. For discharges to surface waters, where groundwater will not be affected by the discharge, the maximum daily concentration (in mg/L) for TDS and/or TIN of the

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[42] Total residual chlorine = 0.1 mg/l or parts per million (ppm) or less; compliance determination shall be at a point before the discharge mixes with any receiving water.

[43] See footnote 42.

[44] Requirements for construction dewatering of stormwater are covered under the General Permit for Stormwater Discharges Associated with Construction Activity Order No. 99-08-DWQ.or the latest version. Where pollutants other than TSS, sulfides, oil and grease, TPH and pH are a concern in the groundwater, coverage under Order No. R8-2007-0008 may be required.

[45] Discharge of dewatering wastes from subterranean seepage into surface water is only allowed if the groundwater meets specifications. If other pollutants of concern are present or discharge specifications are exceeded, coverage under Order No. R8-2007-0008 may be required.

[46] Diversion of stream flows that encroach into Waters of the U.S. requires a 404 permit from the U.S. Army Corps of Engineers and a 401 Water Quality Certification from the Regional Board.

[47] Non-agricultural irrigation using recycled water must comply with the statewide permit for Landscape Irrigation Using Recycled Water and the State Department Health guidelines.

[48] TDS/TIN=Total dissolved solids/total inorganic nitrogen.

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discharge shall not exceed the water quality objectives for the receiving surface water where the effluent is discharged, as specified in Table 4-1 of the Basin Plan.

b. For discharges to surface waters, where the groundwater will be affected by the discharge, the TDS and/or TIN concentrations of the effluent shall not exceed the water quality objectives for the surface water where the effluent is discharged and the affected groundwater management zone, as specified in Table 4-1 of the Basin Plan. The more restrictive water quality objectives shall govern. However, treated effluent exceeding the groundwater management zone water quality objectives may be returned to the same management zone from which it was extracted without reduction of the TDS or TIN concentrations so long as the concentrations of those constituents are no greater than when the groundwater was first extracted. Incidental increases in the TDS and TIN concentrations (such as may occur during air stripping) of treated effluent will not be considered as increases for the purposes of determining compliance with this discharge specification.

4 The Regional Board may add categories of non-storm water discharges that are not significant sources of pollutants or remove categories of non-storm water discharges listed above based upon a finding that the discharges are a significant source of pollutants.

5 See Section XV for additional requirements for de-minimus types of discharges.

C. **Non-point Source (NPS) Discharges**

Consistent with the State Water Resources Control Board's 2004 "Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program," the Regional Board may issue Waste Discharge Requirements for non-point source (NPS) pollutant discharges, such as agricultural irrigation runoff or return flows that are not subject to NPDES requirements, if identified as a significant source of pollutants. In addition, if the water quality significance of NPS discharges is not clearly understood, the Regional Board may issue conditional waivers of Waste Discharge Requirements to NPS dischargers, and require monitoring to gather the information necessary to effectively manage these discharges.

D. **Water Quality Based Effluent Limitations to Implement the Total Maximum Daily Loads (TMDLs)**

1. The Middle Santa Ana River (MSAR) Watershed Bacterial Indicator TMDL-Interim WQBELs (effective upon adoption of this Order)

a. The MSAR Permittees[49] shall:

[49] MS4 Permittees in the MSAR watershed (County, Chino, Chino Hills, Fontana, Montclair, Ontario, Rancho Cucamonga, Rialto and Upland) are collectively referred to as the "MSAR Permittees"

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i. Continue to implement the watershed-wide water quality monitoring program (including any future amendments thereto) approved by the Regional Board (Resolution No. R8-2007-0046) as per Task 3 of the MSAR-TMDL Implementation Plan.

ii. Submit reports summarizing all relevant data from the watershed-wide water quality monitoring program. Beginning in 2010, the wet season report is due to the Executive Officer by May 31st of each year (for monitoring conducted from November 1st through March 31st) and the dry season report is due to the Executive Officer by December 31st of each year (for monitoring conducted from April 1st through October 31st).

iii. Submit comprehensive reports every three years summarizing the data collected for the preceding 3 year period and evaluating progress towards achieving the urban wasteload allocation by the dates specified in the TMDL. The first report is due to the Executive Officer on February 15, 2010.

iv. Continue to implement the approved (Regional Board Resolution No. R8-2008-0044) urban source evaluation plan (USEP) developed as per Task 4.1 of the MSAR-TMDL Implementation Plan. The USEP must describe the specific methods that will be used to identify urban sources and BMPs to address those sources. Submit semi-annual reports on January 31st and July 31st of each year as required under the approved USEP, and any amendments thereto. In years where the comprehensive report referenced in V.D.1.a.iii above is due on February 15, the comprehensive report, Dry Season report (Due December 31st) and the January 31st USEP reports may be combined into a single submittal due February 15th

v. Revise the Municipal Storm Water Management Plan (MSWMP) as specified in Task 4.2 of the MSAR-TMDL Implementation Plan. Summarize any such revisions in the annual report due to the Executive Officer by November 15 of each year.

vi. Revise the Water Quality Management Plan (WQMP) as specified in Task 4.4 of the MSAR-TMDL Implementation Plan. Summarize any such revisions in the annual report due by November 15 of each year.

vii. Amend the Local Implementation Plans (LIP) to be consistent with the revised MSWMP and WQMPs within 90 days after said revisions are approved by the Regional Board. Summarize any such LIP amendments in the annual report due November 15 of each year.

2. Final WQBELs for MSAR Bacterial Indicator TMDL under DRY Weather Conditions

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a. The final WQBELs for bacterial indicators under Dry Weather Conditions contained in this section shall be achieved no later than December 31, 2015. These final effluent limits shall be considered effective for enforcement purposes on January 1, 2016.

b. The Final WQBELs for MSAR Bacterial Indicator TMDL under Dry Weather conditions shall be developed and implemented in the following manner.

i. The MSAR Permittees shall prepare for approval by the Regional Board a Comprehensive Bacteria Reduction Plan (CBRP) describing, in detail, the specific actions that have been taken or will be taken to achieve compliance with the urban wasteload allocation under dry weather conditions (April 1st through October 31st) by December 31, 2015. The CBRP must include:

(a) The specific ordinance(s) adopted to reduce the concentration of indicator bacteria in urban sources.

(b) The specific BMPs implemented to reduce the concentration of indicator bacteria from urban sources and the water quality improvements expected to result from these BMPs.

(c) The specific inspection criteria used to identify and manage the urban sources most likely causing exceedances of water quality objectives for indicator bacteria.

(d) The specific regional treatment facilities and the locations where such facilities will be built to reduce the concentration of indicator bacteria discharged from urban sources and the expected water quality improvements to result when the facilities are complete.

(e) The scientific and technical documentation used to conclude that the CBRP, once fully implemented, is expected to achieve compliance with the urban wasteload allocation for indicator bacteria by December 31, 2015.

(f) A detailed schedule for implementing the CBRP. The schedule must identify discrete milestones to assess satisfactory progress toward meeting the urban wasteload allocations for dry weather by December 31, 2015. The schedule must also indicate which agency or agencies are responsible for meeting each milestone.

(g) The specific metric(s) that will be established to demonstrate the effectiveness of the CBRP and acceptable progress toward meeting the urban wasteload allocations for indicator bacteria by December 31, 2015.

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(h) The MSWMP, WQMP and LIPs shall be revised consistent with the CBRP no more than 180 days after the CBRP is approved by the Regional Board.

(i) Detailed descriptions of any additional BMPs planned, and the time required to implement those BMPs, in the event that data from the watershed-wide water quality monitoring program indicate that water quality objectives for indicator bacteria are still being exceeded after the CBRP is fully implemented.

(j) A schedule for developing a CBRP needed to comply with the urban wasteload allocation for indicator bacteria during wet weather conditions (November 1st thru March 31st) to achieve compliance by December 31, 2025.

ii. The draft CBRP must be submitted to the Regional Board no later than December 31, 2010. The Permittees may submit the plan individually, jointly or through a collaborative effort with other urban dischargers such as the existing MSAR-TMDL Task Force. Regional Board staff will review the document and recommend necessary revisions no more than 90 days after receiving the draft plan. The MSAR Permittees must submit the final version of the plan no more than 90 days after receiving the comments from Regional Board staff. The Regional Board will schedule a public hearing to consider approving the CBRP, as a final water quality-based effluent limitation for the Dry Weather Urban Wasteload Allocation, no more than 120 days after the final plan is submitted by the MSAR Permittees. In approving the CBRP as the final WQBELs, the Regional Board shall make a finding that the CBRP, when fully implemented, shall achieve the urban wasteload allocations for indicator bacteria by no later than December 31, 2015.

iii. Once approved by the Regional Board, the CBRP shall be incorporated into this Order as the final WQBELs for indicator bacteria under Dry Weather Conditions. Based on BMP effectiveness analysis, the CBRP shall be updated, if necessary. The updated CBRP shall be implemented upon approval by the Regional Board.

c. Should the process set forth in subdivision, b, of this section not be completed by December 31, 2015, then the urban wasteload allocations for dry weather conditions specified in the MSAR-TMDL shall become the final numeric WQBELs for indicator bacteria in Dry Weather Conditions, effective January 1, 2016 as follows:

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i. Wasteload Allocation for Fecal Coliform from Urban Sources in Dry Weather Conditions (April 1st through October 31st)[50]

5-sample/30-day logarithmic mean less than 180 organisms/100mL and not more than 10% of the samples exceed 360 organisms/100mL for any 30-day period.

ii. Wasteload Allocation for *E. Coli* from Urban Sources in Dry Weather Conditions (April 1st through October 31st)

5-sample/30-day logarithmic mean less than 113 organisms/100 mL and not more than 10% of the samples exceed 212 organisms/100mL for any 30-day period.

3. Final WQBELs for MSAR Bacterial Indicator TMDL under WET Weather Conditions (effective Jan. 1, 2026)

In the event this Order is still in effect on December 31, 2025, and the Regional Board has not adopted alternative final water quality-based effluent limits for wet weather conditions by that date, then the urban wasteload allocations specified in the MSAR-TMDL for wet weather conditions (November 1st through March 31st) will automatically become the final numeric water quality-based effluent limits for the MSAR Permittees on January 1, 2026.

4. Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions

a. The City of Big Bear Lake, the County of San Bernardino and San Bernardino County Flood Control District (the Big Bear Lake MS4 Permittees) shall implement BMPs designed to assure continued compliance with the following urban wasteload allocation for phosphorus during dry hydrological conditions[51].

Total Phosphorus (lbs/yr)[52] = 475 (Compliance to be achieved by December 31, 2015)

b. The Big Bear Lake MS4 Permittees shall implement BMPs in the watershed so as not to exceed the urban WLA.for phosphorus.

c. The Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force, shall implement the approved (Regional

[50] The fecal coliform WLA becomes ineffective upon the replacement of the REC1 fecal coliform objectives in the Basin Plan by approved REC1 objectives based on *E. Coli*.

[51] The Big Bear Lake MS4 Permittees are already meeting the WLAs. The TMDL for Dry Hydrological Conditions does not specify nutrient reductions from external watershed sources, including urban discharges (WLA), resorts and open space/forested lands (LAs), these external load dischargers are still responsible for reducing their contributions to the internal nutrient loads, which are lake sediment and macrophytes.

[52] Specified as an annual average for dry hydrological conditions.

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Board Resolution No. R8-2008-0070) Big Bear Lake In-lake Nutrient Monitoring Plan dated November 30, 2007, or any lawfully approved amendments thereto. Annual Reports shall be submitted by February 15 of each year.

d. The Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Taskforce, shall implement the approved (Regional Board Resolution No. R8-2009-0043) Big Bear Lake Watershed-wide Nutrient Monitoring Plan (May 2009) in accordance with the schedules specified in Resolution No. R8-2009-0043, or any lawfully approved amendments thereto. Annual Reports shall be submitted by February 15 of each year.

e. No later than February 26, 2010, the Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force, shall submit for approval a plan to evaluate the applicability and feasibility of various in-lake treatment technologies to control noxious and nuisance aquatic plants as described in Task 6C of the BBL-TMDL. The plan shall also include a description of the monitoring conducted and proposed to track aquatic plant diversity, coverage, and biomass. The monitoring data should address, at a minimum, progress toward achieving the numeric targets for macrophyte coverage and percentage of nuisance aquatic vascular plant species. The final approved plan shall be implemented in accordance with the approved schedule.

f. No later than March 31 2010, the Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force, shall submit for approval a plan and schedule for updating the existing Big Bear Lake watershed nutrient model and the Big Bear Lake in-lake nutrient model as described in Task 6A of the BBL TMDL. The plan and schedule must take into consideration additional data and information that are or will be generated from the required TMDL monitoring programs as described in c and d above. The final plan shall be implemented in accordance with the approved schedule.

g. No later than April 15, 2010, the Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the Big Bear TMDL Task Force shall submit for approval a proposed plan and schedule for in-lake sediment nutrient reduction for Big Bear Lake as described in Task 6B of the BBL TMDL. The proposed plan shall include an evaluation of the applicability and feasibility of various in-lake treatment technologies to support development of a long-term strategy for control of nutrients from the sediment. The submittal shall also contain a proposed sediment nutrient monitoring program to evaluate the effectiveness of any strategies implemented. The final plan shall be implemented in accordance with the approved schedule.

h. The plans submitted in e, f, and g above comprise Task 6 of the BBL TMDL –the Big Bear Lake – Lake Management Plan. In addition, the plans submitted in e, f, and g above also must also address the following, either individually or holistically:

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1. The plan shall be based on identified and acceptable goals for lake capacity, biological resources and recreational opportunities. Acceptable goals shall be identified in coordination with Regional Board staff and other responsible agencies, including the California Department of Fish and Game and the U.S. Fish and Wildlife Service.

2. The plan shall include a proposed plan and schedule for the development of biocriteria for Big Bear Lake. This is intended to complement Regional Board efforts to develop biocriteria.

3. The plan must identify a scientifically defensible methodology for measuring changes in the capacity of the lake.

4. The proposed plan shall identify recommended short and long-term strategies for control and management of sediment and dissolved and particulate nutrient inputs to the lake to the extent that the permittees are responsible for these inputs over and above that which would occur naturally.

5. The plan shall also integrate the beneficial use map developed pursuant to the Regional Board's March 3, 2005, Clean Water Act Section 401 Water Quality Standards Certification for Big Bear Lake Nutrient/Sediment Remediation Project. The purpose of the beneficial use map is to correlate beneficial uses of the lake with lake bottom contours. The map is expected to be used in regulating future lake dredge projects to maximize the restoration and protection of the lake's beneficial uses.

i. The Big Bear Lake – Lake Management Plan shall be implemented upon Regional Board approval. Once approved, the plan shall be reviewed and revised as necessary at least once every three years. The review and revision shall take into account assessments of the efficacy of control/management strategies implemented and relevant requirements of new or revised TMDLs for Big Bear Lake and its watershed. Annual Reports shall be submitted by February 15 of each year.

j. The Big Bear Lake MS4 Permittees, individually or collectively, or in collaboration with the with the Big Bear TMDL Task Force shall submit an annual report by February 15 of each year summarizing all relevant data from both water quality monitoring programs and the Lake Management Plan as described in c, d, e, f, g, and h above and evaluating compliance with the WLA using the modeling tools developed pursuant to paragraph k, below.

k. Continued compliance with the WLA will be determined by watershed modeling. By March 31, 2010, the Big Bear Lake MS4 Permittees shall submit a final watershed modeling plan that is ready to be implemented and that details how the WLA will be determined and evaluated in future years. Upon approval by the

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Regional Board, this watershed modeling plan shall be used to determine compliance with the WLA. The Big Bear Lake MS4 Permittees shall select a watershed model that best fits the conditions they are modeling and document the basis for that selection. Data collected under the approved watershed monitoring program shall be evaluated by the Big Bear Lake MS4 Permittees to determine if it falls within the range of dry hydrological conditions as specified in the Nutrient TMDL. The Big Bear Lake MS4 Permittees shall utilize data collected from the monitoring locations specified in the watershed monitoring program approved on May 22, 2009, as well as any other data that are deemed necessary to calibrate and validate the watershed model. The Big Bear Lake MS4 Permittees will document the basis for the selection of the model, the data evaluation and selection process, and the model calibration/validation process. The Big Bear Lake MS4 Permittees or the Big Bear Lake Task Force, shall provide the results of the first model update by February 15, 2011.

l. The Big Bear Lake MS4 Permittees shall revise the Municipal Storm Water Management Plan (MSWMP), Water Quality Management Plan (WQMP) and Local Implementation Plans (LIP) as necessary to implement the plans submitted pursuant to paragraphs c, d, e, f, and g of this section no later than 180 days after the Regional Board approves these plans. A summary of any such revisions shall be included in the area-wide annual report due November 15 of each year.

m. If water quality monitoring data and related modeling analyses indicate that the urban wasteload allocation for total phosphorus is being exceeded during dry hydrological conditions despite implementation of the lake management plan and the MSWMP and other requirements of this Order, the Big Bear Lake MS4 Permittees shall comply with the following procedure:

   1. Each Big Bear Lake MS4 Permittee upstream of the monitoring locations where exceedances appear to be occurring shall evaluate and characterize discharges from its significant outfall locations.

   2. The Big Bear Lake MS4 Permittees shall submit a report with proposed actions to the Executive Officer that describes the BMPs that are currently being implemented and any additional BMPs that will be implemented to reduce the controllable sources of phosphorus causing the exceedances of the urban wasteload allocation for total phosphorus. The report must be submitted as part of the annual report due in November 15 of each year.

n. **Storm Water Program Modification**: The Big Bear Lake MS4 Permittees shall revise their LIPs, as needed, to incorporate the requirements from TMDL implementation activities. These revisions shall include: (1) the results of the nutrient monitoring programs; (2) an evaluation of the effectiveness of the control measures in meeting the phosphorus WLAs; (3) any additional control measures

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proposed to be implemented if the WLA or numeric targets are exceeded, including control measures for controlling nutrient inputs from new developments and/or new sources; and (4) a progress report evaluating progress towards meeting the WLAs (pre-compliance evaluation monitoring[53]).

5. Knickerbocker Creek Sole Source Pathogen Investigation and Control

a. The City of Big Bear Lake shall continue to participate in and implement the January 2008 Phase 2 Monitoring and Reporting Program in accordance with the agreed sampling locations, parameters, schedule, and protocol.

b. The City of Big Bear Lake shall annually review and revise, if necessary, the control measures implemented and undertake an iterative approach until water quality objectives within Knickerbocker Creek are attained, unless it can be demonstrated that the pathogen sources are from uncontrollable sources.

c. The City of Big Bear Lake shall continue to work with Regional Board staff and the Storm Water Quality Standards Task Force to review and update designated uses and related water quality objectives for Knickerbocker Creek. This may result in different water quality objectives for bacteria.

6. Big Bear Lake Mercury TMDL

Pending adoption of the Mercury TMDL, the City of Big Bear Lake shall participate in the development and implementation of monitoring programs and control measures, including any BMPs that the City is currently implementing or proposing to implement.

7. Compliance with WLAs

The determination of compliance with the WLAs shall be based on implementation of BMPs as specified in the implementation plans for the approved TMDLs or based on plans developed as per the approved TMDLs. The Permittees obligation to meet the WLAs is met if the water quality standards in the impaired receiving waters are met through implementation of control measures approved by the Regional Board.

VI. RECEIVING WATER LIMITATIONS

A. Discharges from the MS4s shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives) contained in Chapter 4 of the Basin Plan, and amendments thereto, for surface or groundwater.

B. The MSWMP and its components, including LIPs shall be designed to achieve compliance with receiving water limitations consistent with the MEP standard. It is

[53]Pre-compliance evaluation monitoring is monitoring conducted prior to the compliance date to evaluate effectiveness of pollution reduction efforts.

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expected that compliance with receiving water limitations will be achieved through an iterative process and the application of increasingly more effective BMPs.

C. The Permittees shall comply with Section VI.A of this Order through timely implementation of control measures and other actions to reduce pollutants in urban and storm water runoff in accordance with the MSWMP and its components and other requirements of this Order, including any modifications thereto

D. Upon a determination by either the Permittees or the Executive Officer that the discharges from the MS4 systems are causing or contributing to an exceedance of an applicable water quality standard, the Permittees shall promptly notify either by phone or by e-mail and, thereafter submit a report within 30 days (or if approved by the Executive Officer, this report may be incorporated into the annual report) to the Executive Officer for review and approval. At a minimum, the report shall:

   a. Describe BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce those pollutants that are causing or contributing to the exceedance of water quality standards.

   b. Address the cause of the impairment or exceedance, and the technical and economic feasibility of control actions available to the Permittees to reduce or eliminate the impairment or exceedance consistent with the MEP standard.

   c. Include an implementation schedule.

   d. Contain a comparative analysis of monitoring data to the USEPA Multi-Sector Permit Parameter Benchmark Values and applicable water quality objectives for inland surface streams as specified in Chapter 4 of the Basin Plan.

   e. A status report on the effectiveness of the pollution source investigation and control plan implementation to address exceedance of water quality objectives or elevated pollutant levels above benchmark values may be incorporated in the annual report unless the Executive Officer directs a different submittal date. The transmittal letter shall indicate that the annual report contains a description of additional BMPs proposed, pollution investigation report, and/or pollution source investigation and control plan.

E. The Executive Officer may require modifications to the plan and/or report. The Permittees shall submit any modifications required by the Executive Officer within 30 calendar days of notification. The plan and/or report shall be deemed acceptable if the Executive Officer does not respond with requested modifications within 30 days of the submittal date.

F. Within 60 calendar days following the Executive Officer's approval of the plan and/or report described above (or within 60 days following the date the plan and/or report were deemed acceptable due to lack of response from the Executive Officer), the Permittees shall revise the storm water management programs (MSWMP and LIP) and monitoring program to incorporate the additional BMPs that will be implemented, the implementation schedule, and any additional monitoring required.

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G. Permittees must implement the revised the MSWMP, the LIP and the monitoring and reporting programs in accordance with the schedule approved by the Executive Officer.

H. So long as the Permittees have complied with the procedures set forth above and are implementing the revised LIP, MSWMP, and monitoring program, the Permittees do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless the Executive Officer determines it is necessary to develop additional BMPs.

I. Nothing in Section VI.D must prevent the Regional Board from enforcing any provision of this Order while the Permittee prepares and implements the above programs.

VII. LEGAL AUTHORITY/ENFORCEMENT

A. The Permittees shall maintain adequate legal authority to control the discharge of pollutants to their MS4s through ordinance, statute, permit, contract or similar means and enforce these authorities. This legal authority must, at a minimum, include and authorize the Permittees to:

1. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits. The Permittee must have authority to enter, sample, monitor, inspect, take measurements, photographs, videos, review and copy records, and require reports from industrial, commercial, and construction sites discharging into their MS4s;

2. Recover its cost to correct a discharger's significant non-compliance or to respond to immediate and serious threat to water quality violations through various mechanisms, such as forfeiture of permit deposits, trust funds/bonds or other short-term funding sources to allow Permittees to immediately address and remedy serious water quality violations at construction, industrial, or commercial sites;

3. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s;

4. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of pollutants to the MS4s;

5. Prohibit the disposal of wastes onto public or private land that may cause water quality concerns, unless permitted by Waste Discharge Requirements (WDR) or waiver by the Regional Board;

6. The Permittees' storm water ordinances or other local regulatory mechanisms shall include sanctions to ensure compliance. Sanctions shall include but are not limited to: verbal and/or written warnings, notice of violation or non-compliance, monetary penalties, non-monetary penalties, bonding requirements, stop work or cease and desist Orders and/or permit denials/revocations/stays for non-compliance, civil or criminal prosecution. These sanctions shall be issued in a decisive manner within a predetermined timeframe, from the time of the violation's occurrence and/or follow-up inspection.

B. The Permittees shall document progressive and decisive enforcement actions against violators of their storm water codes and ordinances in accordance with the formalized enforcement procedures developed by the Management Committee.

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C. The Permittees shall use the most effective tool(s) at their disposal (such as Stop Work Orders and suspended inspections) to achieve immediate compliance. Permittees must have the ability to enforce any violations of the Stop Work Order through either an automatic fine or other effective means.

D. Within three (3) years of adoption of this Order, the Permittees shall implement fully adopted ordinances that would specify control measures for known pathogen or bacterial sources such as animal wastes if those types of sources are present within their jurisdiction.

E. The Permittees shall continue to provide notification to Regional Board staff of storm water related information obtained during site inspections of industrial and construction sites regulated by the Statewide General Storm Water Permits or sites which should be regulated under the State's General Permits. The notification should include any observed violations of the General Permits or local requirements, prior history of violations, any enforcement actions taken and will be taken by the Permittees, and any other relevant information.

F. The Permittees shall annually notify owners of other MS4 systems outside the Permittees' jurisdiction, regarding the regulatory requirements for control of pollutants in MS4 discharges (including relevant requirements from the MSWMP and WQMP), where feasible, and consistent with the MEP standard. The Permittees will also send these notifications to the Regional Board. The Permittees shall specify, in the LIP, the mechanisms or procedures to control the contribution of pollutants into their MS4s prior to accepting connections from owners of other MS4 systems outside the Permittees' jurisdiction. At a minimum, the Permittees shall notify these owners of other MS4 systems outside their jurisdiction of the requirement to comply with the post-construction standard in the State's General Construction Permit (Order No. 2009-0009-DWQ). A copy of the notification shall be provided to the Regional Board.

G. The Permittees shall annually review their water quality ordinances and evaluate their effectiveness in prohibiting the following types of discharges to the MS4s (the Permittees may propose appropriate control measures in lieu of prohibiting these discharges, where the Permittees are responsible for ensuring that dischargers adequately maintain those control measures):

1. Sewage (also prohibited under the Statewide SSO Order[54]);
2. Wash water resulting from the hosing or cleaning of gas stations, auto repair garages, and other types of automobile service stations;
3. Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, concrete mixing equipment, portable toilet servicing, etc.;
4. Wash water from mobile auto detailing and washing, steam and pressure cleaning, carpet/upholstery cleaning, pool cleaning and other such mobile commercial and industrial activities;

[54]State Board WQO No. 2006-0003.
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5. Water from cleaning of municipal, industrial, and commercial sites, including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc.;
6. Runoff from material storage areas or uncovered receptacles that contain chemicals, fuels, grease, oil, or other hazardous materials[55];
7. Discharges of runoff from the washing of toxic materials[56] from paved or unpaved areas;
8. Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; pool filter backwash containing debris and chlorine;
9. Pet waste, yard waste, litter, debris, sediment, etc.; and,
10. Restaurant or food processing facility wastes such as grease, floor mat and trash bin wash water, food waste, etc.

H. Each Permittee shall include in its LIP the legal authorities and mechanisms used to implement the various program elements required by this Order to properly manage, reduce and mitigate potential pollutant sources within its jurisdiction. The LIP shall include citations of appropriate local ordinances, identification of departmental jurisdictions and key personnel in the implementation and enforcement of these ordinances. The LIP shall include procedures, tools and timeframes for progressive enforcement actions and procedures for tracking compliance.

I. The Permittees shall enforce their ordinances and permits at all construction sites, industrial facilities and commercial facilities as necessary to maintain compliance with this Order. Sanctions for non-compliance shall include: monetary penalties, bonding requirements and/or permit denial or revocation.

J. Within 12 months of adoption of this Order, each Permittee shall submit a certification statement, signed by legal counsel, that the Permittee has obtained all necessary legal authority in accordance with 40 CFR 122.26(d)(2)(i)(A-F) and to comply with this Order through adoption of ordinances and/or municipal code modifications. A copy of the certification shall also be placed in the LIP. Those Permittees who have already complied with this requirement during the third-term permit need not submit additional certification statements.

K. Annually thereafter, Permittees shall review adequacy of their ordinances, implementation and enforcement response procedures with respect to the above items. The findings of the reviews, along with supporting details and recommended corrective actions and schedules shall be submitted as part of the annual report for the corresponding reporting period. The Permittees' LIPs shall be updated accordingly.

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[55]Hazardous material is defined as any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by EPA to be reported if a designed quantity of the material is spilled into the waters of the United States or emitted into the environment.

[56]Toxic material is a chemical or a mixture that may present an unreasonable risk of injury to health or the environment.

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VIII. ILLICIT DISCHARGES (ID)/ILLEGAL CONNECTIONS (IC); LITTER, DEBRIS AND TRASH CONTROL

A. The Permittees shall continue to prohibit all illegal connections to the MS4s through their ordinances, inspections, monitoring programs, and enforcement actions. The Permittees shall develop a pro-active IC/ID or illicit discharge detection and elimination program (IDDE) using the Guidance Manual for Illicit Discharge, Detection, and Elimination by the Center for Watershed Protection[57] or any other equivalent program. Any illegal connections identified by routine inspections, the IDDE program, or dry weather screening and/or monitoring shall be investigated and eliminated or permitted within 120 days of discovery.

B. The Permittees' IDDE program shall specify a procedure to conduct focused, systematic field investigations, outfall reconnaissance survey, indicator monitoring, and tracking of discharges to their sources[58]. The IDDE program(s) shall be linked to urban watershed protection efforts including: a) the use of GIS maps of the Permittees' conveyance systems to track sources ; b) aerial photography to detect IC/IDs; b) municipal inspection programs of construction, industrial, commercial, storm drain systems, municipal facilities, etc.; c) analysis of watershed monitoring and other indicator data; d) watershed education to educate the public about illegal discharges; e) pollution prevention for generating sites; f) stream restoration efforts/opportunities; and g) rapid assessment of stream corridors to identify dry weather flows and illegal dumping.

C. The LIP shall identify the staff positions responsible for different components of the IDDE program.

D. The Permittees shall maintain a database of permitted and unpermitted connections, routine inspections and dry weather monitoring. This information shall be updated on an ongoing basis and submitted with the annual report.

E. The Permittees shall control, consistent with the MEP standard, the discharge of spills, leaks, or dumping of any materials other than storm water and authorized non-storm water per Section V, above, into the MS4s. All reports of spills, leaks, and/or illegal dumping shall be promptly investigated and reported as specified under Section XVII (Notification Requirements).

F. The Permittees shall continue to characterize trash, determine its main source(s) and develop and implement appropriate BMPs and control measures to reduce and/or to eliminate the discharge of trash and debris to Waters of the U.S. to the MEP. These control measures and their effectiveness in reducing trash shall be reported in the annual report.

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[57] USEPA (Illicit Discharge Detection and Elimination - A Guidance Manual for Program Development and Technical Assessments) by the Center for Watershed Protection and Robert Pitt, University of Alabama, October 2004, updated 2005).

[58] Table 2: Land uses, Generating Sites and Activities that Produce Indirect Discharges from IDDE, A Guidance Manual for Program Development and Technical Assessments, October 2004 CWP.

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IX. SEWAGE SPILLS, INFILTRATION INTO MS4 SYSTEMS FROM LEAKING SANITARY SEWER LINES, SEPTIC SYSTEM FAILURES, AND PORTABLE TOILET DISCHARGES

A. The Permittees shall provide local sanitation districts 24-hour access to the MS4s to address sewage spills and shall provide updated contact information to enable such access. The Permittees shall work cooperatively with the local sewering agencies to determine and control the impact of infiltration from leaking sanitary sewer systems on storm water quality. Each Permittee shall implement control measures necessary to minimize infiltration of seepage from sanitary sewers to the storm drain systems through routine preventive maintenance of the storm drain system.

B. Permittees who are regulated under the Statewide General Waste Discharge Requirements for Sanitary Sewer Systems, Water Quality Order No. 2006-0003-DWQ, (SSO Order), shall continue to comply with that Order to control sanitary system overflows.

C. The Principal Permittee shall collaborate with the local sewering agencies to review and revise, as needed, the Sanitary Sewer Overflow Unified Response Plan to ensure its consistency with the SSO Order.

D. The interagency or interdepartmental sewer spill response coordination and responsibility within each Permittee's jurisdiction shall be described in the LIP.

E. The Permittees shall implement management measures and procedures to prevent, respond to, contain and clean up all sewage and other spills that may be discharged into their MS4s. Management and/or preventative measures shall also be implemented for sources including portable toilets and failing septic systems that are causing or contributing to urban and storm water runoff pollution problems in their jurisdictions.

F. Within 2 years of adoption of this Order, Permittees with septic systems in their jurisdiction shall develop an inventory of septic systems within its jurisdiction and establish a program to ensure that failure rates are minimized pending adoption of regulations as per Assembly Bill 885[59] regarding onsite waste water treatment systems.

X. MUNICIPAL INSPECTION PROGRAMS

A. General Requirements

1. The Permittees shall continue to maintain and update the inventory of all construction, industrial and commercial facilities within their jurisdiction that have a reasonable potential to discharge pollutants to the MS4 regardless of whether the sites are subject to the California Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities or the California Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities or other individual NPDES permit or Waste Discharge Requirements. The Permittees may use the MS4 Solutions or equivalent database for this purpose (see X.A.2., below).

[59] http://www.waterboards.ca.gov/water_issues/programs/septic_tanks/
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2. The Permittees shall conduct regular inspections of construction sites, industrial and commercial facilities to evaluate compliance with applicable municipal ordinances, local permits, Storm Water Management Plans, and Water Quality Management Plans (see Sections B, C, and D, below for frequency of inspections). Inspections shall review pollution control practices, implementation and maintenance of pollution control measures, material handling and waste disposal practices, spill prevention and response programs and owner/operator knowledge of environmental laws and regulations, including local ordinances. The Permittees shall enforce their ordinances and permits at all construction, industrial, and commercial facilities in a fair, firm and consistent manner.

3. The municipal inspection program activities shall be documented in an electronic database. The database system must include relevant information on ownership, Standard Industrial Classification (SIC) codes, General Permit Waste Discharge Identification (WDID) number (if any), size, Geographic Information System (GIS) data in NAD83/WGS84[60] compatible formatting with latitude/longitude in decimal degrees, and other pertinent details describing the nature of activities at the site. The information shall be maintained in the MS4 Solution Database or equivalent internet accessible database. In addition to the facility information, the inspection information shall include: date of inspection; inspectors and facility personnel present; site conditions, any observed non-compliance; enforcement actions and/or corrective actions required and schedules for corrective actions; and date of full compliance. The database shall be updated at least once each year and an electronic copy provided to the Regional Board with each annual report.

4. Within 18 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees shall develop a risk-based scoring system to prioritize construction, industrial and commercial facilities and to determine the frequency of inspections. The scoring system shall consider factors including, but not limited to: the hazardous nature of materials used on site; potential for erosion and pollutant discharges, particularly such materials as pre-production plastic (nurdles) or pollutants for which the receiving water is impaired; site size and location including proximity to receiving water, history of spills and leaks; use of pollution control and prevention measures; and compliance history. The risk-based scoring system shall include criteria to identify the facilities as high, medium or low risk and shall be submitted to the Executive Officer for approval. The electronic database submitted with the annual report (see X.A.3, above) shall include the risk-based scores for each facility. The facility scores must be reviewed and updated annually, if necessary.

5. Prior to development and implementation of the risk-based scoring system, construction, industrial and commercial sites shall be inspected in accordance with the prioritization scheme set forth in the third term permit.

6. Any site found in significant non-compliance with the Statewide General Permits or the MS4 Permit is deemed a high priority site and must be contacted or inspected at

[60] NAD83/WGS84=North American Datum of 1983 and World Geodetic System of 1984 are systems to define three dimensional coordinates of a single physical point.

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least once per month until full compliance is achieved.

7. The Permittees shall verify during inspections and/or prior to local permit issuance whether a site has obtained necessary permit coverage under one or more of the Statewide General Permits, an individual NPDES permit, Waste Discharge Requirements, and/or 401 Certification. Local permits, certificates of occupancy, or other approvals shall not be granted until proof of coverage under the applicable statewide permit is verified.
8. The Permittees shall deem facilities operating without a proper permit to be in significant non-compliance. Appropriate enforcement measures shall be implemented including a time schedule to obtain coverage, or suspension of business license until evidence of permit coverage is provided. Non-filers shall be reported within 14 calendar days to the Regional Board by electronic mail or other written means. The Permittees shall include in their LIP the method for verification of permit coverage and for notification of non-filers to the Regional Board.
9. Permittees shall maintain hard or electronic copies and make available upon request all information related to their inspections, including inspection reports, photographs, videotapes, enforcement actions, notices of correction issued to dischargers and other relevant information. This information shall be linked to the electronic database identified in Section X.A.3 above.
10. The Permittees need not inspect facilities already inspected by Regional Board staff if the inspection was conducted within the specified time period. Regional Board staff inspection information is available at www.ciwqs.ca.gov[61].
11. Each Permittee shall respond to complaints received from third parties in a timely manner to ensure that the construction, industrial and commercial sites are not a source of pollutants in the MS4s and the receiving waters. Each Permittee shall implement a system of prioritizing the complaints based on threat to the environment (water quality/public health) and an appropriate response time based on this prioritization.
12. Each Permittee shall document, evaluate, and annually report the effectiveness of its enforcement procedures in achieving prompt and timely compliance. When timely compliance is not achieved, the Permittee shall take appropriate corrective measures to immediately prevent or abate the discharge of pollutants into its MS4 system.
13. Where storm water related inspections and/or enforcement required by this Order are carried out on behalf of the Permittee by other agencies or departments such as: the County Public Health, county and/or local fire departments, code enforcement, industrial pretreatment, building and safety, etc., the Permittee shall monitor and annually evaluate and report adequacy of such programs in complying with this Order.

[61] To obtain access to the State database, registration at the following link is necessary: http://www.waterboards.ca.gov/water_issues/programs/ciwqs/chc_npdes.shtml. Contact information is available at http://www.waterboards.ca.gov/water_issues/programs/ciwqs/contactus.shtml.

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14. All inspectors conducting storm water inspection as required in this Order shall be trained in accordance with the training requirements specified in Section XVI.

B. Construction Sites

1. Each Permittee shall include in the electronic database identified in Section X.A.3 an inventory of all construction sites within its jurisdiction for which building or grading permits are issued and activities at the site include: soil movement; uncovered storage of materials or wastes, such as dirt, sand or fertilizer; or exterior mixing of cementaceous products, such as concrete, mortar or stucco.
2. Prior to approval of the risk-based scoring and prioritization system, the Permittees shall continue to prioritize construction sites within its jurisdiction as a high, medium or low threat to water quality. This prioritization of construction sites shall be based on factors, which shall include but not be limited to: soil erosion potential, project size, proximity and sensitivity of receiving waters and any other relevant factors. At a minimum, high priority construction sites shall include: sites 50 acres and greater; sites over 1 acre that are tributary to Clean Water Act section 303(d) waters listed for sediment or turbidity impairments; site specific characteristics[62], and any other relevant factor. At a minimum, medium priority construction sites shall include: sites between 10 to less than 50 acres of disturbed soil. Upon approval of the risk-based scoring system, the sites shall be categorized as high, medium, or low risk based on the risk-based scores.
3. Each Permittee shall conduct construction site inspections for compliance with its ordinances (grading, Water Quality Management Plans, etc.) and local permits (construction, grading, etc.). The Permittees shall develop a checklist for conducting site inspections. Inspections of construction sites shall include, but not be limited to:
   a. Verification of coverage under the General Construction Permit (Notice of Intent (NOI) or Waste Discharge Identification No.) during the initial inspection. Permit coverage shall also be confirmed in the event of a change in ownership.
   b. A review of the Erosion and Sediment Control Plans (ESCP) to ensure that the BMPs implemented on-site are consistent with the appropriate phase of construction (Preliminary Stage, Mass Grading Stage, Streets and Utilities Stage, Vertical Construction Stage, and Post-Construction Stage).
   c. Visual observations for non-storm water discharges, potential illicit connections, and potential pollutant sources.
   d. Determination of compliance with local ordinances, permits, Water Quality Management Plans and other requirements, including the implementation and maintenance of BMPs required under local requirements.
   e. An assessment of the effectiveness of BMPs implemented at the site and the need for any additional BMPs. In evaluating BMP effectiveness, the Permittees may consider applicable action levels (AL) and/or numeric effluent limits (NEL)

[62] The approved General Construction Permit Order No. 2009-0009-DWQ includes risk-based characterization of construction sites based on site-specific conditions.

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promulgated by the State or USEPA.

4. At a minimum, the inspection frequency shall include the following:
   a. During the wet season[63] (i.e., Oct 1 through May 31 of each year), all high priority (or high risk) sites are to be inspected, in their entirety, once a month. All medium priority (or medium risk) sites are to be inspected at least twice during the wet season. All low priority (or low risk) sites are to be inspected at least once during the wet season. When BMPs or BMP maintenance is deemed inadequate or out of compliance, an inspection frequency of once every week shall be maintained until BMPs and BMP maintenance are brought into compliance.
   b. During the dry season (i.e., June 1 through September 30 of each year), all construction sites shall be inspected at a frequency sufficient to ensure that sediment and other pollutants are properly controlled and that unauthorized, non-storm water discharges are prevented.
5. The Permittees' implementation of their construction storm water program shall be consistent with the latest version of the statewide General Construction Permit and all applicable provisions of the federal effluent limitations guidelines.

C. Industrial Facilities

1. Prior to approval of the risk-based scoring and prioritization system, the Permittees shall continue to prioritize industrial facilities within its jurisdiction as high, medium, or low threat to water quality. The prioritization of these facilities should be based on such factors as type of industrial activities (SIC codes)[64], materials or wastes used or stored outside, pollutant discharge potential, compliance history, facility size, proximity and sensitivity of receiving waters, and any other relevant factors. At a minimum, a high priority shall be assigned to: facilities subject to section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA); facilities that handle or generate pollutants for which the receiving water is impaired, facilities that have a demonstrated or significant potential to release pre-production plastic or nurdles into the environment, and facilities with a high potential for or history of unauthorized, non-storm water discharges. Upon approval of the risk-based scoring system, the facilities shall be categorized as high, medium or low risk.
2. Each Permittee shall conduct industrial facility inspections for compliance with its ordinances, permits and this Order. Industrial inspections shall include: a review of the site's material and waste handling and storage practices; a review of written documentation of pollutant control BMP implementation and maintenance procedures; digital photographic documentation of water quality violations, and/or evidence of past or present unauthorized-, non-storm water discharges; and enforcement actions issued at the time of inspection if necessary. A summary of

[63] Wet and dry season for TMDL compliance evaluation will be the months as defined in the TMDL development documents and implementation plans. See Glossary, Attachment 4.

[64] Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;

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inspections shall be included in the annual report and shall document the rational for downgrading or upgrading the priority ranking of industrial facilities.

3. All high priority (or high risk) industrial facilities are to be inspected at least once a year; all medium priority (or medium risk) sites are to be inspected at least once every two years; and all low priority (or low risk) sites are to be inspected at least once per permit cycle. In the event that inappropriate material or waste handling or storage practices are observed, or there is evidence of past or present unauthorized, non-storm water discharges, appropriate enforcement actions shall be taken and a re-inspection frequency adequate to bring the site into full compliance must be maintained.
4. Each Permittee shall require industrial facilities to implement source control and pollution prevention measures consistent with the BMP Fact Sheets developed by the Permittees.

D. Commercial Facilities

1. All of the following types of commercial facilities are deemed to have a reasonable potential to discharge pollutants to the MS4s. These types of facilities shall be included in the database identified in Section X.A.3. Commercial facilities may include, but may not be limited to[65]:

   a. Transport, storage or transfer of pre-production plastic pellets;
   b. Automobile mechanical repair, maintenance, fueling or cleaning;
   c. Automobile and other vehicle body repair or painting;
   d. Automobile impound and storage services;
   e. Airplane repair, maintenance, fueling or cleaning;
   f. Marinas and boat repair, maintenance, fueling or cleaning;
   g. Equipment repair, maintenance, fueling or cleaning;
   h. Pest control service facilities;
   i. Eating or drinking establishments, including food markets and restaurants;
   j. Cement mixing, concrete cutting, masonry facilities;
   k. Building materials retailers and storage facilities;
   l. Portable sanitary service facilities;
   m. Painting and coating;
   n. Animal facilities such as petting zoos and boarding and training facilities;
   o. Nurseries, greenhouses, botanical or zoological gardens;
   p. Landscape and hardscape installation;
   q. Pool, lake and fountain cleaning; and
   r. Golf courses, parks and other recreational areas/facilities;

2. The Permittees shall continue to develop BMPs applicable for each of the commercial operations described above.

[65]Mobile cleaning services are addressed in X.D.6 and 7, below.

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3. Prior to approval of the risk-based scoring system, each Permittee shall conduct inspections of commercial facilities within its jurisdiction in accordance with the prioritization scheme set forth in the third-term permit.
4. All high priority (or high risk) facilities shall be inspected at least once per year; all medium priority (or medium risk) facilities shall be inspected at least every two years; and all low priority (or low risk) facilities shall be inspected at least once per permit cycle. At a minimum, each facility shall be required to implement source control and pollution prevention measures consistent with the BMP Fact Sheets developed by the Permittees.
5. In the event that inappropriate material or waste handling or storage practices are observed, or there is evidence of past or present unauthorized, non-storm water discharges, appropriate enforcement action shall be taken and documented to bring the site into compliance.
6. Within 36 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, shall notify all mobile businesses operating within the Permit area regarding the minimum source control and pollution prevention measures that they must develop and implement. For purposes of this Order, mobile businesses include: mobile auto washing/detailing; equipment washing/cleaning; carpet, drape, and furniture cleaning; and mobile high pressure or steam cleaning. The mobile businesses shall be required to implement appropriate control measures within 3 months of being notified of the requirements.
7. Within 36 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, shall develop an enforcement strategy to address mobile businesses. Each Permittee shall also distribute the BMP Fact Sheets to the mobile businesses identified for notification as required in Section X.D.6, above. At a minimum, the mobile business Fact Sheets/training program should include: laws and regulations dealing with urban runoff and discharges to storm drains; appropriate BMPs and proper procedure for disposing of wastes generated from each mobile business.
8. The Principal Permittee, in coordination with the Co-Permittees shall continue to maintain a restaurant inspection program, or coordinate and collaborate with the San Bernardino County Public Health Agency's restaurant inspection program. The restaurant inspection program shall, at a minimum, address:
    a. Oil and grease disposal to verify that these wastes are not poured into a trash bin, storm sewers, parking lot, street or adjacent catch basin;
    b. Trash bin areas to verify that these areas are clean, the bin lids are closed, and the bins are not used for disposing of liquid wastes;
    c. Parking lot, alley, sidewalk and street areas to verify that floor mats, filters and garbage containers are not washed in those areas and that no wash water is disposed of into those areas;
    d. Parking lots to verify that they are cleaned by sweeping, not by hosing down, and that the facility operator uses dry methods for spill cleanup; and,

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e. Inspection of existing devices designed to separate grease from wastewater (e.g., grease traps or interceptors) to ensure adequate capacity and proper maintenance is currently performed under the Fats, Oils and Grease (FOG) program (the FOG inspections conducted under the Statewide SSO Order [Water Quality Order No. 2006-0003] could be substituted for this inspection).

9. All violations of the Water Quality Ordinance shall be enforced by the Permittees and all violations of the Health and Safety Code should be enforced by the Public Health Agency.

E. Residential Program

1. Within 36 months of adoption of this Order, each Permittee shall, consistent with the MEP standard, develop and implement a residential program designed to reduce the discharge of pollutants from residential facilities to the MS4s and to prevent discharges from the MS4s from causing or contributing to exceedances of water quality standards in the receiving waters.
2. The Permittees shall identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets/BMPs. At a minimum, this should include: residential auto washing and maintenance activities; use and disposal of pesticides, herbicides, fertilizers and household cleaners; and collection and disposal of pet wastes. The Permittees shall encourage residents to implement pollution prevention measures. The Permittees should work with sub-watershed groups to disseminate the latest research information from organizations such as the Inland Empire Resource Conservation District[66], The Land Trust Alliance, The USDA Natural Resources Conservation Service, USDA's Backyard Conservation Program[67], and others.
3. Each Permittee shall document its residential program in its LIP.
4. The Permittees shall continue to, collectively or individually, facilitate the proper collection and management of used oil, toxic and hazardous materials, and other household wastes. Such facilitation shall include educational activities, public information activities, and establishment of curbside or special collection sites managed by the Permittees or private entities, such as solid waste haulers. Each Permittee shall continue these programs and periodically evaluate their effectiveness in reducing discharges of pollutants into the MS4s.
5. The Permittees shall develop and implement control measures for common interest areas and areas managed by homeowner associations or management companies. This may include development and promotion of public education materials identifying BMPs for these common interest areas or HOA areas. The Permittees

[66]The District provides gardening and horticulture information appropriate for the area including native plant selection, backyard management, alternatives to pesticide, irrigation scheduling and composting.

[67]Backyard Conservation, Bringing Conservation from the Countryside to Your Backyard, USDA Natural Resources Conservation Service, National Association of Conservation Districts, Wildlife Habitat Council and National Audubon Society.

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should evaluate the applicability of programs such as the Landscape Performance Certification Program[68] to encourage efficient water use and to minimize runoff[69].

6. The Permittees shall enforce their Water Quality Ordinance for all residential areas and activities. The Permittees should encourage new developments to use weather-based evapotranspiration (ET) irrigation controllers[70].
7. Each Permittee shall include an evaluation of its Residential Program in the annual report starting with the first annual report after adoption of this Order.

XI. NEW DEVELOPMENT (INCLUDING SIGNIFICANT RE-DEVELOPMENT)

A. General Requirements:

1. Each Permittee shall continue to ensure (prior to issuance of any local permits or other approvals) that all non-Permittee construction sites that are one acre or greater, and sites less than one acre if part of a common plan of development have filed with the State Board a Notice of Intent for coverage under the State's General Construction Permit and have been issued a valid Waste Discharge Identification (WDID) number. Each Permittee shall describe its General Permit coverage verification procedures in its LIP.
2. Each Permittee shall ensure that the erosion and sediment control plans it approves include appropriate erosion and sediment control BMPs (e.g., erosion control measures for sloped or hill-side developments, ingress/egress controls, perimeter controls, run-on diversion, etc.) such that an effective combination of BMPs consistent with site risk is implemented through all phases of construction.
3. Each Permittee shall utilize the BMP studies conducted during the previous permit terms to determine the most appropriate erosion and sediment control BMPs. The conditions of approval shall require erosion and sediment control plans, SWPPPs, and WQMPs, as applicable. These documents shall specify the appropriate BMPs.
4. Each Permittee shall ensure, consistent with the maximum extent practicable standard, that runoff from development projects it approves, does not cause nuisance to adjoining or downstream properties and stream channels.
5. Each Permittee shall ensure, to the MEP, that urban runoff conveyance systems created resulting from development projects it approves are appropriately maintained consistent with Section XIII of this Order or are adequately maintained by a legally responsible party.

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[68] For example, see the Metropolitan Water District of Orange County's Evaluation of the Landscape Performance Certification Program, January 2004.

[69] The Residential Runoff Reduction Study, Municipal Water District of Orange County, Irvine Ranch Water District and Metropolitan Water District of Southern California, July 2004.

[70] Westpark Study, Municipal Water District of Orange County, Irvine Ranch Water District and Metropolitan Water District of Southern California, 2001.

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6. Prior to accepting connections from owners of other MS4 systems outside the Permittees' jurisdiction, the Permittees shall notify these owners of other MS4 systems outside their jurisdiction of the requirement to comply with the post-construction standard in the State's General Construction Permit and the regulatory requirements for control of pollutants in MS4 discharges (including relevant requirements from the MSWMP and WQMP), where feasible, and consistent with the MEP standard. A copy of the notification shall be provided to the Regional Board.
7. Each Permittee shall ensure that appropriate control measures to reduce erosion and maintain stream geomorphology are included in the design for replacement of existing culverts or construction of new culverts and/or bridge crossings.
8. Each Permittee shall minimize the short and long-term adverse impacts on receiving water quality from public and private new development and significant re-development projects, as required in Section XI.D (Water Quality Management Plan), below, by continuing to review, approve, and verify implementation of project-specific WQMPs, emphasizing implementation of LID principles, where feasible, and addressing hydrologic conditions of concern, and long term operation and maintenance mechanisms prior to project closure or issuance of certificates of occupancy.
9. Each Permittee shall participate in the development of the Watershed Action Plan, described in Section B below, to integrate water quality, stream protection and stormwater management and re-use within the permitted area with land use planning policies, ordinances, and plans, as applicable, and consistent with the MEP standard.

B. **Watershed Action Plan**

1. The Permittees shall develop an integrated watershed management approach to improve integration of planning and approval processes with water quality and quantity control measures. Management of the water quality and hydrologic impacts of urbanization will be more effective whether managed on a per site, sub-regional or regional basis, if coordinated within the Watershed Action Plan. Pending completion of a Watershed Action Plan, management of the impacts of urbanization shall be accomplished using existing programs.
2. Within twelve months of adoption of this Order, each Permittee shall review the watershed protection principles and policies, specifically addressing urban and storm water runoff, in its planning procedures, including CEQA preparation, review and approval processes; General Plan and related documents including, but not limited to its Development Standards, Zoning Codes, Conditions of Approval, Development Project Guidance; and WQMP development and approval processes.
3. The Principal Permittee, in collaboration with the Co-Permittees, shall develop a Watershed Action Plan (WAP) that describes and implements the Permittees' approach to coordinated watershed management. The WAP shall improve coordination of existing programs and identify new and/or enhanced program elements as applicable. The objective of the WAP is to improve integration of water quality, stream protection, storm water management, water conservation and re-use, and flood protection, with land use planning and development processes. The WAP shall be developed in two phases:

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a. Phase 1: within 12 months of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees shall:

   i. Identify program-specific objectives for the WAP; the objectives will include consideration of:

      1. The watershed protection principles specified in Section XI.C.3.a – g, below;
      2. The Permittee's planning and procedure review required in XI.B.2, above;
      3. Potential impediments to implementing watershed protection principles during the planning and development processes, including but not limited to LID principles and management of the impacts of hydromodification;
      4. Impaired waters [CWA § 303(d) listed] with and without approved TMDLs, pollutants causing impairment, monitoring programs for these pollutants, control measures, including any BMPs that the Permittees are currently implementing, and any BMPs the Permittees are proposing to implement. In addition, if a TMDL has been developed and an implementation plan is yet to be developed, the WAP shall specify that the responsible Permittees should develop constituent-specific source control measures, conduct additional monitoring and/or cooperate with the development of an implementation plan, where feasible, and consistent with the MEP standard.

   ii. Develop a structure for the WAP that emphasizes coordination of watershed priorities with the Permittees' LIPs via the areawide model LIP;

   iii. Identify linkages between the WAP and the SWQSTF, MSWMP, WQMP, the implementation of LID, and the TMDL Implementation Plans;

   iv. Identify other relevant existing watershed efforts (Chino Basin Master Plan, SAWPA's IRWMP, etc., and their role in the WAP;

   v. Ensure that the HCOC Map/Watershed Geodatabase is available to watershed stakeholders via the World Wide Web, and has incorporated the following information:

      1. Delineation of existing unarmored or soft-armored drainages in the permitted area that are vulnerable to geomorphological changes due to hydromodification and those channels and streams that are engineered, hardened, and maintained.
      2. GIS layers for known sensitive species, protected habitat areas, drainage boundaries, and potential storm water recharge areas and/or reservoirs;
      3. 303(d)-listed waterbodies and associated pollutants;
      4. Available and relevant regulatory and technical documents accessible via hyperlinks;

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vi. Develop a schedule and procedure for maintaining the Watershed Geodatabase, and develop a draft schedule for expected enhancements to increase functionality;

vii. Review the Watershed Geodatabase with Regional Board staff from the Storm Water, TMDL, and Watershed Planning/ Program Sections, and other resource agencies, to verify attributes of the Geodatabase, including drainage feature stability/susceptibility/risk assessments, and the intended use of the Geodatabase to support regulatory processes such as WQMP approvals, Clean Water Act Section 401 Water Quality Standards Certifications (401 Certifications), and LID BMP feasibility evaluations;

viii. Identify potential causes of identified stream degradation including a consideration of sediment yield and balance on a watershed or subwatershed basis.

ix. Conduct a system-wide evaluation[71] to identify opportunities to retrofit existing storm water conveyance systems, parks, and other recreational areas with water quality protection measures, and develop recommendations for specific retrofit studies that incorporates opportunities for addressing applicable TMDL implementation plans, hydromodification management, and/or LID implementation within the permitted area.

x. Conduct a system wide evaluation to identify opportunities for joint or coordinated development planning to address stream segments vulnerable to hydromodification and coordinated re-development planning to identify restoration opportunities for hardened and engineered streams and channels. The WAP shall identify contributing jurisdictions and the stream segments that will benefit from this coordination.

xi. Invite participation and comments from resource conservation districts, water and utility agencies, state and federal agencies, non-governmental agencies and other interested parties in the development and use of the Watershed Geodatabase;

xii. Submit the Phase 1 components in a report to the Executive Officer for approval. The Report shall be deemed acceptable to the Regional Board if the Executive Officer submitted raises no written objections within 30 days of submittal. .

b. Phase 2: within 12 months of the approval by the Executive Officer of the Report from Phase 1, above, the Principal Permittee, in coordination with the Co-Permittees, shall:

i. Contingent upon consensus with Regional Board staff and other resource agencies as described in XI.B.3.a.vii, above, specify procedures and a schedule to integrate the use of the Watershed Geodatabase into the implementation of the MSWMP, WQMP, and TMDLs;

[71] For example, see the 2005 RBF Retrofit Study conducted for Orange County MS4 permittees. January 29, 2010 (Final)

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ii. Develop and implement a Hydromodification Monitoring Plan (HMP) to evaluate hydromodification impacts for the drainage channels deemed most susceptible to degradation. The HMP will identify sites to be monitored, include an assessment methodology, and required follow-up actions based on monitoring results. Where applicable, monitoring sites may be used to evaluate the effectiveness of BMPs in preventing or reducing impacts from hydromodification.

iii. Develop and implement a Hydromodification Management Plan prioritized based on drainage feature/susceptibility/risk assessments and opportunities for restoration.

iv. Conduct training workshops in the use of the Watershed Geodatabase. Each Permittee must ensure that their planning and engineering staff attend a workshop.

v. Conduct demonstration workshops for the Watershed Geodatabase to be attended by appropriate upper-level managers and directors from each Permittee.

vi. Develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs. The recommendations should include information needed to be submitted to the Regional Board for approval of regional treatment control BMPs. At a minimum, this information should include: BMP location; type and effectiveness in removing pollutants of concern; projects tributary to the regional treatment system; engineering design details; funding sources for construction, operation and maintenance; and parties responsible for monitoring effectiveness, operation and maintenance. The Permittees are encouraged to collaborate and work with other counties to facilitate and coordinate these recommendations.

vii. Implement applicable retrofit or regional treatment recommendations from the evaluation conducted in Section B.3.a.ix, above.

viii. Submit the Phase 2 components in a report to the Executive Officer. The submitted report shall be deemed acceptable to the Regional Board if the Executive Officer raises no written objections within 30 days of submittal.

4. Within three years of adoption of this Order, each Permittee shall review the watershed protection principles and policies in its General Plan or related documents (such as Development Standards, Zoning Codes, Conditions of Approval, Development Project Guidance) to determine consistency with the Watershed Action Plan. Each Permittee shall report the findings in the annual report along with a schedule for any necessary revision.

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C. **Consideration of Watershed Protection Principles in California Environmental Quality Act (CEQA) and Planning Processes**:

1. The Permittees shall ensure that the direct, indirect, and cumulative water quality impacts of storm water and non-storm water runoff are properly considered and addressed in their land-use planning processes. The following potential water quality impacts shall be considered during the preparation and circulation of environmental documents prepared pursuant to CEQA:
   a. Potential impact of project construction on storm water runoff.
   b. Potential impact of project's post-construction activity on storm water runoff.
   c. Potential for discharge of storm water pollutants from areas of material storage, vehicle or equipment fueling, vehicle or equipment maintenance (including washing), waste handling, hazardous materials handling or storage, delivery areas or loading docks, or other outdoor work areas.
   d. Potential for discharge of storm water to affect the beneficial uses of the receiving waters.
   e. Potential for significant changes in the flow velocity or volume of storm water runoff to cause environmental harm.
   f. Potential for significant increases in erosion of the project site or surrounding areas.
2. For any project that may require a 401 Certification from the State, the Permittees shall coordinate project review with Regional Board staff pursuant to the requirements of CEQA. Upon request by Regional Board staff, this coordination shall include the timely provision of the discharger's identity and their contact information and the facilitation of early-consultation meetings
3. The Principal Permittee shall collaborate with the Co-Permittees to develop recommendations to resolve any impediments to implementing watershed protection principles during the planning and development processes, including LID principles and management of hydrologic conditions of concern (See Section E below). The Principal Permittee shall collaborate with the Co-Permittees to develop common principles and policies necessary for water quality protection. The watershed protection principles and policies should include the following:
   a. Avoid disturbance of natural water bodies, drainage systems and flood plains; conserve natural areas; protect slopes and channels; minimize impacts from storm water and urban runoff on the biological integrity of natural drainage systems and water bodies;
   b. Minimize changes in hydrology and pollutant loading; require incorporation of controls including structural and non-structural BMPs to mitigate any projected increases in pollutant loads and flows; ensure that post-development runoff rates and velocities from a site do not adversely impact downstream erosion, stream habitat; minimize the quantity of storm water directed to impermeable surfaces and the MS4s; maximize the percentage of permeable surfaces to allow more percolation of storm water into the ground;

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c. Preserve wetlands, riparian corridors, and buffer zones; establish reasonable limits on the clearing of vegetation from the project site;

d. Use properly designed and well maintained water quality wetlands, biofiltration swales, watershed-scale retrofits, etc., where such measures are likely to be effective and technically and economically feasible;

e. Provide for appropriate permanent measures to reduce storm water pollutant loads in storm water from the development site; and

f. Establish development guidelines for areas particularly susceptible to erosion and sediment loss.

g. Consider pollutants of concern (identified in the risk-based analysis provided in the 2006 ROWD, the annual reports and the list of impaired waterbodies (303(d) list)) and propose appropriate control measures.

4. Within 24 months following the review specified in B.2, above, each Permittee shall incorporate the following information into its LIP and its project approval process:

   a. The Permittees shall identify and map in GIS format the natural channels, wetlands, riparian corridors and buffer zones and identify conservation and maintenance measures for these features. The Watershed Action Plan should include information needed for this effort. This requirement will be most effective if met through development of areawide HCOC maps or other joint efforts.

   b. Each Permittee shall include in the LIP the applicable tools (such as ordinances, design standards, and procedures) used to implement green infrastructure/low impact development principles for public and private development projects.

   c. For hillside development projects, each Permittee shall consider and facilitate application of landform grading techniques[72] and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss.

5. Each Permittee shall provide Regional Board staff with the draft amendment or revision when a pertinent General Plan element or the General Plan is noticed for comment in accordance with Govt. Code § 65350 et seq.

D. Water Quality Management Plan (WQMP) Requirements[73]:

1. Each Permittee shall continue to require project-specific Water Quality Management Plans (WQMP) for priority projects listed under Section XI.D.4.a to i.

2. Within 18 months of adoption of this Order, the Principal Permittee shall coordinate the revision of the WQMP Guidance and Template to include new elements required under this Order.

[72] http://www.epa.gov/region3/mtntop/pdf/Appendixes/Appendix%20D%20Aquatic/Aquatic%2OEcosystem%20Enhanc.%20Symp/Proceedings/Support%20Info/Schor/Landform.pdf

[73] Priority projects are those listed under Section XI.D.4.a to i.

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3. Each Permittee shall require submittal of a preliminary project-specific WQMP as early as possible during the environmental review or planning phase (land use entitlement). No building or grading permit shall be issued prior to approval of the final project–specific WQMP that is developed based on the preliminary project-specific WQMP and any recommended revisions, as appropriate.

4. The combination of site design/LID BMPs (where feasible), source control, and/or treatment control BMPs, including regional treatment systems, in project-specific WQMPS shall address all identified pollutants and hydrologic conditions of concern from new development and/or significant re-development projects for the categories of projects (priority projects) listed below:

   a. All significant re-development projects. Significant re-development is defined as the addition or replacement of 5,000 or more square feet of impervious surface on an already developed site subject to discretionary approval of the Permittee. . Redevelopment does not include routine maintenance activities that are conducted to maintain original line and grade, hydraulic capacity, original purpose of the facility, or emergency redevelopment activity required to protect public health and safety. Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing developed site, and the existing development was not subject to WQMP requirements, the numeric sizing criteria discussed below applies only to the addition or replacement, and not to the entire developed site. Where redevelopment results in an increase of fifty percent or more of the impervious surfaces of a previously existing developed site, the numeric sizing criteria applies to the entire development.

   b. New development projects that create 10,000 square feet or more of impervious surface (collectively over the entire project site) including commercial, industrial, residential housing subdivisions (i.e., detached single family home subdivisions, multi-family attached subdivisions or townhomes, condominiums, apartments, etc.), mixed-use, and public projects. This category includes development projects on public and private land, which fall under the planning and building authority of the Permittees.

   c. Automotive repair shops (with SIC codes 5013, 5014, 5541, 7532-7534, 7536-7539).

   d. Restaurants (with SIC code 5812) where the land area of development is 5,000 square feet or more.

   e. All hillside developments of 5,000 square feet or more which are located on areas with known erosive[74] soil conditions or where the natural slope is twenty-five percent or more.

   f. Developments of 2,500 square feet of impervious surface or more adjacent to (within 200 feet) or discharging directly[75] into environmentally sensitive areas (ESAs) such as areas designated in the Ocean Plan as areas of special biological significance or waterbodies listed on the CWA Section 303(d) list of

[74] See General Construction Permit Order No. 2009-0009-DWQ.

[75] Discharging directly means a drainage or conveyance which carries flows entirely from the subject development and not commingled with any other flows.

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impaired waters.

g. Parking lots of 5,000 square feet or more exposed to storm water. Parking lot is defined as land area or facility for the temporary parking or storage of motor vehicles.

h. Retail Gasoline Outlets (RGOs) that are either 5,000 sq feet or more, or have a projected average daily traffic of 100 or more vehicles per day.

i. Emergency public safety projects in any of the above-listed categories shall be excluded if the delay caused due the requirement for a WQMP compromises public safety, public health and/or environmental protection.

5. WQMPs shall include BMPs for source control, pollution prevention, site design, LID implementation, where feasible, (see Section E, below) and structural treatment control BMPs. WQMPs shall include control measures for any listed pollutant[76] to an impaired waterbody on the 303(d) list such that the discharge shall not cause or contribute to an exceedance of receiving water quality objectives. The Permittees shall require the following source control BMPs for each priority development project, unless formally substantiated as unwarranted in a written submittal to the Permittees:

   a. Minimize contaminated runoff, including irrigation runoff, from entering the MS4s;

   b. Provide appropriate secondary containment and/or proper covers or lids for materials storage, trash bins, and outdoor processing and work areas;

   c. Minimize storm water contact with pollutant sources;

   d. Provide community car wash and equipment wash areas that discharge to sanitary sewers;

   e. Minimize trash and debris in storm water runoff through regular street sweeping and through litter control ordinances.

   f. The pollutants in post-development runoff shall be reduced using controls that utilize best management practices, as described in the California Storm Water Quality Handbooks, Caltrans Storm Water Quality Handbook or other reliable sources.

6. Treatment control BMPs shall be in accordance with the approved model WQMP and must be sized to comply with one of the following numeric sizing criteria:

   a. VOLUME

   Volume-based BMP design applies to BMPs where the primary mode of pollutant removal depends upon the volumetric capacity, such as detention, retention, and infiltration basins. These criteria specify the capture and infiltration or treatment of a percentile of the average annual rainfall volume (also referred to as percent capture ratio).

[76]For a waterbody listed under Section 303(d) of the Clean Water Act, the pollutant that is causing the impairment is the "listed pollutant".

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Volume–based BMPs shall be designed to infiltrate, harvest and use, filter, or treat either:

i. The volume of runoff produced from a 24-hour, 85th percentile storm event, as determined from the County of San Bernardino's 85th Percentile Precipitation Isopluvial Map; or,

ii. The volume of annual runoff produced by the 85th percentile, 24-hour rainfall event determined as the maximized capture storm water volume for the area, from the formula recommended in Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87 (1998); or,

iii. The volume of annual runoff based on unit basin storage volume, to achieve 80 (or more volume treatment by the method recommended in California Stormwater Best Management Practices Handbook – Industrial/Commercial (1993); or,

iv. The volume of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile, 24-hour runoff event;

OR

b. FLOW

Flow-based BMP design applies to BMPs where the primary mode of pollutant removal depends upon the rate of flow thru the BMP, such as swales, sand filters, screening devices, and proprietary devices such as storm drain inserts.

Flow–based BMPs shall be designed to infiltrate, harvest and use, filter, or treat either:

i. The maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour; or,

ii. The maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from the local historical rainfall record, multiplied by a factor of two; or,

iii. The maximum flow rate of runoff, as determined from the local historical rainfall record that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile hourly rainfall intensity multiplied by a factor of two.

7. The obligation to install structural BMPs at a new development is met if, for a common plan of development, BMPs are constructed with the requisite capacity to serve the entire common project, even if certain phases of the common project may not have BMP capacity located on that phase in accordance with the requirements specified above. All treatment control BMPs should be located as close as possible to the pollutant sources, should not be located within Waters of the U.S., and pollutant removal should be accomplished prior to discharge to Waters of the U.S. Regional treatment control BMPs shall be completed and operational prior to occupation of any of the priority project sites tributary to the regional treatment BMP.

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8. **Groundwater Protection:**

Treatment Control BMPs utilizing infiltration [exclusive of incidental infiltration and BMPs not designed to primarily function as infiltration devices (such as grassy swales, detention basins, vegetated buffer strips, constructed wetlands, etc.) must comply with the following minimum requirements to protect groundwater:

a. Use of structural infiltration treatment BMPs shall not cause or contribute to an exceedance of groundwater water quality objectives.

b. Source control and pollution prevention control BMPs shall be implemented to protect groundwater quality. The need for pre-treatment BMPs such as sedimentation or filtration should be evaluated prior to infiltration.

c. Adequate pretreatment of runoff prior to infiltration shall be required in gas stations and large commercial parking lots.

d. Unless adequate pre-treatment of runoff is provided prior to infiltration structural infiltration treatment BMPs must not be used for areas of industrial or light industrial activity[77], areas subject to high vehicular traffic (25,000 or more daily traffic); car washes; fleet storage areas; nurseries; or any other high threat to water quality land uses or activities.

e. Class V injection wells or dry wells must not be placed in areas subject to vehicular[78] repair or maintenance activities[79], such as an auto body repair shop, automotive repair shop, new and used car dealership, specialty repair shop (e.g., transmission and muffler repair shop) or any facility that does any vehicular repair work.

f. Structural infiltration BMP treatment shall not be used at sites that are known to have soil and groundwater contamination.

g. Structural infiltration treatment BMPs shall be located at least 100 feet horizontally from any water supply wells.

h. The vertical distance from the bottom of any infiltration structural treatment BMP to the historic high groundwater mark shall be at least 10 feet. Where the groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained.

i. Structural infiltration treatment BMPs shall not cause a nuisance or pollution as defined in Water Code Section 13050.

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[77] Unless a site assessment pursuant to criteria developed in Section XI.E.3 shows that site operations do not pose a threat to ground water.

[78] Vehicles include automobiles; motor vehicles include trucks, trains, boats, motor cycles, farm machineries, airplanes and recreation vehicles such as snow mobiles, all terrain vehicles, and jet skis.

[79] United States Environmental Protection Agency, Office of Water, EPA 816-R-00-008, September 2000 State Implementation Guidance – (Revisions to the UIC Regulations for the Underground Injection Control Regulations for Class V Injection Wells, 64 FR 68546) indicate that these activities are prohibited from Class V Injection wells.

E. Low Impact Development (LID) and Hydromodification Management to Minimize Impacts from New Development / Significant Redevelopment

The objective of LID is to mimic pre-development site hydrology through technically and economically feasible source control and site design techniques. LID combines hydrologically functional site design with pollution prevention methods to compensate for land development impact on hydrology and water quality.

1. Within 18 months of adoption of this Order, each Permittee shall evaluate any potential barriers to implementing LID principles. This shall be done in conjunction with the requirements specified under Sections XI.B.3.a and XI.C.3. To facilitate implementation of LID BMPs, the Permittees should consider revising their ordinances, codes and building and landscape design standards. The Permittees shall promote green infrastructure/LID BMP implementation and identify the applicable LID principles in the project specific WQMP:

   a. Landscape designs that promote water retention and evapotranspiration such as 1 foot depth of compost/top soil in commercial and residential areas on top of 1 foot of decompacted subsoil, concave landscape grading to allow runoff from impervious surfaces, and water conservation by selecting native plants, weather-based irrigation controllers, etc.

   b. Allow permeable surface designs in low traffic roads and parking lots, where feasible. This may require land use/building code amendment.

   c. Allow natural drainage systems for street construction and catchments (with no drainage pipes), and allow grassy swales and ditches where feasible.

   d. Require parking lots to drain to landscaped areas to provide treatment, retention, or infiltration, where feasible.

   e. Reduce curb requirements, where feasible, where adequate drainage, conveyance, treatment and storage are available.

   f. Amend where feasible and practicable, land use/building codes to allow streets with no curbs and parking lots with no stop blocks to allow storm water to drain into landscaped areas.

   g. Require, where feasible, rainwater harvesting and use.

   h. Consider building narrow streets, alternatives to minimum parking requirements, etc.

   i. Consider vegetated landscape as an integral element of streets, parking lots, playground and buildings as a storm water treatment and retention system.

   j. Consider and facilitate application of landform grading techniques[80] and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss such as hillside development projects,

[80] http://www.epa.gov/region3/mtntop/pdf/Appendixes/Appendix%20D%20Aquatic/Aquatic%2OEcosystem%20Enhanc.%20Symp/Proceedings/Support%20Info/Schor/Landform.pdf

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k. Consider other site design BMPs identified in the WQMP Guidance and Template and not included above.

2. Consistent with the requirements of AB 1881, each Permittee is mandated to update its landscape ordinance. The bill requires the local agencies to adopt the State Model Water Efficient Landscape Ordinance[81] or prepare one that is "at least as effective" as the State Model by January 2010. The proposed state model ordinance applies to landscape requiring a building or landscape permit, plan check or design review. Each Permittee shall provide the Regional Board a copy of its report to Department of Water Resources (DWR).

3. To reduce pollutants in urban runoff, address hydromodification, and manage storm water as a resource to the maximum extent practicable, WQMPs shall specify preferential use of site design BMPs that incorporate LID techniques in the following manner (from highest to the lowest priority): (1) Preventative measures (these are mostly non-structural measures, e.g., preservation of natural features to a level consistent with the maximum extent practicable standard; minimization of runoff through clustering, reducing impervious areas, etc.) and (2) Mitigative measures (these are structural measures, such as, infiltration, harvesting and use, bio-treatment, etc.). The mitigative or structural site design BMPs shall also be prioritized (from highest to lowest priority): (1) Infiltration BMPs (examples include permeable pavement with infiltration beds, dry wells, infiltration trenches, surface and sub-surface infiltration basins. The Permittees should work with local groundwater management agencies to ensure that infiltration Treatment Control BMPs are designed appropriately; (2) BMPs that harvest and use (e.g., cisterns and rain barrels); and (3) Vegetated BMPs that promote evapotranspiration including bioretention, biofiltration and bio-treatment.

4. The Permittees shall reflect in the Water Quality Management Plan Guidance and Template and require each priority development project to infiltrate, harvest and use, evapotranspire, or bio-treat[82] the 85th percentile storm event ("design capture volume"), as specified in Section XI.D. 6 above. Any portion of the design capture volume that is not infiltrated, harvested, used, evapotranspired or bio-treated[83] onsite by LID BMPs shall be treated and discharged in accordance with the requirements set forth in Section XI.E.10 and/or Section XI.G, below.

5. Within 18 months of adoption of this Order, the Permittees shall review and update the Water Quality Management Plan Guidance and Template to incorporate LID principles (where feasible) and to address the impact of urbanization on downstream hydrology. At a minimum, the following elements shall be included during the update:

   a. Site Design BMPs:

[81] http://www.water.ca.gov/wateruseefficiency/landscapeordinance/

[82] A properly engineered and maintained bio-treatment system may be considered only if infiltration, harvesting and use and evapotranspiration cannot be feasibly implemented at a project site (feasibility criteria will be established in the WQMP [Section XI.E.7]. Specific design, operation and maintenance criteria for bio-treatment systems shall be part of the model WQMP that will be produced by the permittees.

[83] For all references to bio-treat/bio-treatment, see footnote 82.

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i. Review and update the menu of site design BMPs to include any LID BMP that is currently not listed.

ii. Include as a reference for design and installation of LID BMPs the *LID Guidance Manual for Southern California* developed by the Southern California Coastal Water Research Project upon its completion.

iii. Techniques or specifications to minimize soil compaction in areas designated for site design BMPs, especially infiltration.

iv. Review and update design, installation and test specifications for retention BMPs to prevent unwanted ponding.

v. Evaluate the use of a credit system[84] for using site design BMPs.

vi. Develop in-lieu programs for projects where implementation may not be feasible.

b. Source Control BMPs:

i. Review and update the menu of source control BMPs.

ii. Include design and installation standards for each structural source control BMP.

c. Treatment Control BMPs:

i. Update the list of treatment control BMPs, including an evaluation of their effectiveness based on national, statewide or regional studies.

ii. Prioritize treatment control BMPs based on their effectiveness in pollutant removal and require project proponents to select the most appropriate BMPs.

iii. Include design and installation standards for each treatment control BMP.

d. Hydrologic Conditions of Concern (HCOC):

i. The Permittees shall continue to ensure, consistent with the MEP standard, through their review and approval of project-specific WQMPs that new development and significant re-development projects:

a) do not cause a hydrologic condition of concern (HCOC), or

b) otherwise, demonstrate that the project does not have the potential to cause significant adverse impacts on downstream natural channels and habitat integrity, alone or in conjunction with the impacts of other projects likely to be implemented in the same drainage area.

ii. A development/redevelopment project does not cause a HCOC if it causes no adverse downstream impacts on the physical structure, aquatic, and riparian habitat and any of the following conditions is met: and any of the following conditions is met:

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[84]See sample credit calculation spreadsheet in Appendix 2 of the adopted statewide construction permit,. http://www.waterboards.ca.gov/water_issues/programs/stormwater/constpermits.shtml January 29, 2010 (Final)

a) The project disturbs less than one acre and is not part of a common plan of development.

b) The post-development site hydrology (including runoff volume, velocity, duration, time of concentration[85],) is not significantly different from pre-development hydrology for a 2- year return frequency storm. A difference of 5% or less is considered insignificant.

c) All downstream conveyance channels that will receive runoff from the project are engineered, hardened and regularly maintained to ensure design flow capacity, and no sensitive stream habitat areas will be affected. This exemption is only applicable to conveyance channels that have received regulatory approvals prior to June 1, 2004, including CEQA review and approvals by US Army Corps of Engineers, Regional Board, and California Department of Fish and Game.

iii. Where flow reduction strategies are established as part of TMDL compliance plans, decreases in flow loading from pre-development conditions are allowed and encouraged where necessary to protect or restore designated beneficial uses.

iv. If a project causes a HCOC, and a Watershed Action Plan has not been approved, the WQMP shall specify one of the following:

a) Verify the project's potential to cause significant adverse impacts by conducting a further evaluation of the projects impact on stream geomorphology and/or aquatic habitat. This evaluation should include consideration of pre- and post-development hydrograph volumes, time of concentration and peak discharge velocities for a 2 year storm event, consideration of sediment budgets, and a sediment transport analysis. If this evaluation confirms the project's potential to cause significant adverse downstream impacts on downstream natural channels and habitat integrity, alone or in conjunction with impacts of other projects, then the project shall satisfy items b), c), d), e), or f), below. If the evaluation indicates minimal impact on stream channels and habitats, no further action is required.

b) Require additional onsite or offsite mitigation to reduce potential erosion or impacts to aquatic habitats by using LID BMPs, where feasible, or other control measures.

c) Require in-stream controls[86] to mitigate the impacts on downstream natural channels and habitat integrity. The project proponent should first consider site design controls and on-site controls prior to proposing in-stream controls; in-stream controls must not adversely impact beneficial uses or

[85] Time of concentration is defined as the time after the beginning of rainfall when all portions of the drainage basin are contributing simultaneously to flow at the outlet.

[86] In-stream measures involve modifying the receiving stream channel slope and geometry so that the stream can convey the new flow regime without increasing the potential for erosion and aggradation. In-stream measures are intended to improve long-term channel stability and prevent erosion by reducing the erosive forces imposed on the channel boundary.

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result in sustained degradation of water quality of the receiving waters and shall require all necessary regulatory approvals[87].

d) Mitigate the HCOC through implementation of the approved Watershed Action Plan.

e) If site conditions do not permit items b), c), or d) above, the alternatives and in-lieu programs discussed in the LIP, may be considered.

6. The WQMP shall specify methods for determining time of concentration.

7. A feasibility analysis that includes technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID.

   i. The feasibility analysis shall include a groundwater protection assessment to determine if structural infiltration BMPs are appropriate for the site

8. Integrate Watershed Action Plan and TMDL Implementation Plans into project-specific WQMPs in affected watersheds.

9. Within 18 months of adoption of this Oder, a copy of the updated WQMP Guidance and Template shall be submitted for review and approval by the Executive Officer. The Permittees shall implement the updated WQMP Guidance and Template within 90 days of approval. If the Executive Officer has not approved the WQMP Guidance and Template within 18 months of adoption of this Order, either the Permittees shall require implementation of LID BMPs, or determine infeasibility of LID BMPs for each project through a project-specific analysis, each of which shall be submitted to the Executive Officer, at least 30 days prior to Permittee approval. Such feasibility determinations shall be certified by a Professional Civil Engineer registered in the State of California, and will be documented in the project WQMP, which shall be approved by the Permittee prior to submittal to the Executive Officer. Within 30 days of submittal to the Executive Officer, the Permittee will be notified if the Executive Officer intends to take any action. Once the updated WQMP Guidance and Template has been approved by the Executive Officer, the submittal of feasibility determinations to the Executive Officer is no longer required.

10. If site conditions do not permit infiltration, harvesting and use, and/or evapotranspiration, and/or bio-treatment of the design capture volume at the project site as close to the source as possible, the alternatives a), b), and c), below, and the credits and in-lieu programs discussed under Section G, below, may be considered and implemented:

    a. Implement LID principles to the MEP at the project site close to the point of storm water generation and infiltrate and/or harvest and re-use at least the design capture volume through designated infiltration/treatment areas elsewhere within the project site.

[87] In-stream control projects require a Streambed Alteration Agreement from the California Department of Fish & Game, a CWA section 404 permit from the U.S. Army Corps of Engineers, and a section 401 certification from the Water Board. Early discussions with these agencies on the acceptability of an in-stream modification are necessary to avoid project delays or redesign.

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b. Implement LID on a sub-regional basis. For example, at a 100 unit high density housing unit with a small strip mall and a school: connect all roof drains to vegetated areas (if there are any vegetated areas, otherwise storm water storage and use may be considered or else divert to the local storm water conveyance system, to be conveyed to the local treatment system), construct a storm water infiltration gallery below the school playground to infiltrate and/or harvest and re-use the design capture volume.

c. Implement LID on a regional basis. For example, several developments could propose a regional system to address storm water runoff from all the participating developments.

d. For alternatives a), b), and c) above, the pervious areas to which the runoff from the impervious areas are connected should have the capacity to infiltrate, harvest and use, evapotranspire and/or bio-treat at least the design capture volume from the entire tributary area.

F. Road Projects

1. Within 24 months of adoption of this Order, the Principal Permittee, in cooperation with the Co-Permittees, shall develop standard design and post-development BMP guidance to be incorporated into projects for public streets, roads, highways, and freeway improvements to reduce the discharge of pollutants from the projects to the MEP. The draft guidance shall be submitted to the Executive Officer for review and approval and shall meet the performance standards for site design/LID BMPs, source control and treatment control BMPs as well as the HCOC criteria. The guidance and BMPs shall address any paved surface used for transportation of automobiles, trucks, motorcycles, and other vehicles, and excludes routine road maintenance activities where the surface footprint is not increased. The guidance shall incorporate principles contained in the USEPA guidance, "Managing Wet Weather with Green Infrastructure: Green Streets" to the maximum extent practicable and at a minimum shall include the following:

   a. Guidance specific to new road projects;
   b. Guidance specific to projects for existing roads;
   c. Size or impervious area criteria that trigger project coverage;
   d. Preference for green infrastructure approaches wherever feasible;
   e. Criteria for design and BMP feasibility analyses on a project –specific basis.

2. Within six months of approval by the Executive Officer, the Permittees shall implement the standard design and post-development plan for all municipal road projects.

3. Pending approval of the standard design and post-development BMP Guidance, Permittees shall require site-specific WQMPs for streets, roads and highway projects consistent with Section XI.D.4 of this Order.

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G. Alternatives and In-Lieu Programs

1. If a preferred BMP is not technically feasible, other BMPs should be implemented to mitigate the project impacts, or if the cost of BMP implementation greatly outweighs the pollution control benefits, the Permittees may grant a waiver of the BMPs. All waivers, along with waiver justification documentation, must be submitted to the Executive Officer at least 30 days prior to Permittee approval of the WQMP. Only those projects that have completed a feasibility analysis as specified in the WQMP Guidance and Template (see Section XI.E.7) and approved by the Executive Officer shall be considered for alternatives and in-lieu programs. If a waiver is granted, the Permittees shall ensure that project proponents participate in one of the in-lieu programs discussed in this section.
2. The Permittees may collectively or individually propose to establish an urban runoff fund to be used for urban water quality improvement projects within the same watershed that is funded by contributions from developers granted waivers. The contributions should be at least equivalent to the cost savings for waived projects and and the urban runoff fund shall be expended for projects that provide at least an equivalent amount of water quality improvement (there shall be no net impact on water quality due to a waived project) . If a waiver is granted and an urban runoff fund is established, the annual report for the year should include the following information with respect to the urban runoff fund:
   a. Total amount deposited into the fund and the party responsible for managing the urban runoff fund;
   b. Projects funded or proposed to be funded with monies from the urban runoff fund;
   c. Party or parties responsible for design, construction, operation and maintenance of urban runoff funded projects; and
   d. Current status and a schedule for project completion.
3. The obligation to install structural site design and/or treatment control BMPs at a new development is met if, for a common plan of development, BMPs are constructed with the requisite capacity to serve the entire common project, even if certain phases of the common project may not have BMP capacity located on that phase in accordance with the requirements specified above. The goal of the WQMP is to develop and implement practicable programs and policies to minimize the effects of urbanization on site hydrology, urban runoff flow rates, velocities, duration and time of concentration and pollutant loads. This goal may be achieved through watershed-based structural treatment controls, in combination with site-specific BMPs. All treatment control BMPs should be located as close as possible to the pollutant sources, should not be located within Waters of the U.S., and pollutant removal should be accomplished prior to discharge to waters of the US. Regional treatment control BMPs shall be operational prior to occupation of any of the priority project sites tributary to the regional treatment BMP.
4. The Permittees may establish a water quality credit system for alternatives to LID and hydromodification requirements specified above. The following types of projects may be considered for the credit system:

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a. Redevelopment projects that reduce the overall impervious area
b. Brownfield redevelopment
c. High density developments (>7 units per acre)
d. Mixed use and transit-oriented development (within ½ mile of transit)
e. Dedication of undeveloped portions of the project site to parks, preservation areas and other pervious uses
f. Regional treatment systems with a capacity to treat flows from all upstream developments
g. Offsite mitigation within the same watershed (see E.5.d.iv above)
h. City Center area
i. Historic Districts and Historic Preservation areas
j. Live-work developments
k. In-fill projects

5. The water quality credit system should not result in a net impact on water quality.
6. A summary of waivers of LID, Hydromodification and Treatment Control BMPs, along with any water quality credit granted, in-lieu projects or urban runoff fund contribution required by each Permittee shall be included in the annual report.

H. Approval of WQMP

Within 18 months of adoption of this Order, each Permittee shall develop and implement standard procedures and tools, and include in its LIP the following:

1. A WQMP review checklist that incorporates the required elements of the WQMP and a clear process for consultation early in the planning process with the Permittee's appropriate departments and sections. This review process shall involve the Permittee's Planning and Engineering Departments during the preliminary and final WQMP review to adequately incorporate project-specific water quality measures and watershed protection principles in their CEQA analysis.
2. Tools or procedures to incorporate project conditions of approval, including proper funding and maintenance and operation of all structural BMPs. The parties responsible for the long-term maintenance and operation of the BMPs upon project close-out and a funding mechanism for operation and maintenance shall be identified prior to approval of the WQMP.
3. A procedure to ensure that appropriate easements and ownerships are recorded/included in appropriate documents that provides the Permittee the authority for post-construction BMP operation and maintenance (also see J.1, below).
4. A final project close-out procedure and checklist to ensure that post-construction BMPs (site design, structural source control and treatment control BMPs) have been

built as per the approved WQMPs or other conditions of approval and are fully functional prior to issuance of certificates of occupancy (also see I.1 and I.2, below).

5. A procedure to work cooperatively with the local vector control district to address any vector problems associated with the water quality control systems. If not properly designed and maintained, some of the BMPs implemented to treat urban runoff could create a habitat for vectors (e.g., mosquitoes and rodents) and become a nuisance. The WQMP review, approval, and closure processes shall include consultation and collaboration with the local vector control districts on BMP design, installation, and operation and maintenance to prevent or minimize vector issues. If vector or nuisance problems are identified during inspections, the local vector control district should be notified.
6. Staff involved with WQMP review and approval shall be trained in accordance with Section XVI, Training Requirements.

I. Field Verification of BMPs

1. The Permittees' project close-out procedures shall include field verification that site design, source control and treatment control BMPs are designed, constructed and functional in accordance with the approved WQMP. Documentation of the field verification, including the WDID number, if applicable, information on the type, location and maintenance responsibility of the BMPs shall be sent to the Regional Board office by regular mail or electronic mail.
2. In addition, post-construction BMPs shall be inspected, prior to the rainy season, within three years after project completion and every three years thereafter. The Permittees shall verify, through visual observation, that the BMPs are properly maintained, operating, and are functional. Results of the inspections shall be reported in the Annual Report.

J. Change of Ownership and Recordation

1. The Permittees shall establish a mechanism to track changes in ownership and responsibility for the operation and maintenance of post-construction BMPs to ensure that they are properly recorded in public records at the County and/or City and the information is conveyed to all appropriate parties when there is a change in project or site ownership.
2. The Permittees shall maintain a database to track all structural treatment control BMPs, including the location of BMPs, parties responsible for construction, operation and maintenance.

K. Operation and Maintenance of Post-Construction BMPs

1. The Permittees shall ensure, to the MEP, that all post-construction BMPs continue to operate as designed and implemented with control measures necessary to effectively minimize the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, flies, etc. WQMPs shall identify the responsible party for maintenance, including vector minimization and control measures, and funding

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source(s) for operation and maintenance of all site design and structural treatment control systems. Permittees shall, through conditions of approval and during inspections, ensure proper maintenance and operation of all permanent structural post-construction BMPs installed in new developments. Design of these structures shall allow adequate access for maintenance.

2. Within twelve months of adoption of this Order, the Permittees shall develop a database to track operation and maintenance of post-construction BMPs. The database should include available BMP information such as the type of BMP design, location of BMPs (latitude and longitude), date of construction, party responsible for maintenance, maintenance frequency, source of funding for operation and maintenance, maintenance verification, and any problems identified during inspection including any vector or nuisance problems. A copy of this database shall be submitted with the annual report.

L. Pre-Approved Projects

1. The above provisions shall be implemented in a manner consistent with the maximum extent practicable standard for all priority projects 90 days from the date of approval of the updated Water Quality Management Plan Guidance and Template as per Section XI.E.5.
2. The above provisions for LID and hydrologic conditions of concern are not applicable to projects that have an approved WQMP prior to the date of adoption of the revised WQMP Guideline and Template (Section XI.D.2). The Regional Board recognizes that full implementation may not be feasible for certain projects which have received tentative tract or parcel map or other approvals prior to the approval of the updated WQMP.

XII. PUBLIC EDUCATION AND OUTREACH

A. The Permittees shall continue to implement the public education efforts already underway as described in the 2006 ROWD/MSWMP and shall implement the most effective elements of the comprehensive public and business education strategy upon completion of the risk-prioritization strategy to this program element. Each year the Permittees shall review their public education and outreach efforts and revise their activities to adapt to the needs identified in the annual reassessment of program priorities with particular emphasis on addressing the most critical behaviors that cause storm water pollution problems. Any changes to the on-going public education program must be described in the annual report.

B. Consistent with the MEP standard, each Permittee shall implement applicable elements of the public education and outreach program measurably increase public knowledge regarding the storm drain system and the impacts of urban runoff on receiving water quality.

C. When feasible and effective, the Permittees shall participate in joint outreach programs with other agencies including, but not limited to the Santa Ana Watershed Project

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Authority, Caltrans, and other county and municipal storm water programs to ensure that a consistent message on storm water pollution prevention is disseminated to the public.

D. The Permittees shall facilitate implementation of BMPs listed in the Storm Water Management Plan and/or the Water Quality Management Plan for restaurants, automotive service centers, gasoline stations and other similar facilities by distributing BMP brochures or other fact sheets to these facilities during inspections and/or through other means.

E. Within 12 months from the date of adoption of this Order, the Permittees shall develop and maintain BMP guidance for the control of those potentially polluting activities identified during the previous permit cycle, which are not otherwise regulated by any agency, including guidelines for the household use of fertilizers, pesticides, herbicides and other chemicals, and guidance for mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting. These guidance documents shall be distributed to the public, trade associations, etc., through participation in community events, trade association meetings and/or by mail.

F. The Permittees shall ensure that appropriate educational materials, including the BMP brochures, are provided to all new industrial and commercial enterprises in their jurisdiction at the time building and construction permits (or occupancy permits) are issued and/or at the time business licenses are issued.

G. The Permittees shall continue to maintain a hotline telephone number and website to allow the public to report illegal dumping from residential, industrial, construction or commercial sites into public streets, storm drains and other waterbodies. The hotline number and website address for reporting storm water pollution problems shall be promoted in an appropriate outreach effort. The Permittees shall further develop and maintain public education materials to encourage the public to report illegal dumping and unauthorized, non-storm water discharges from residential, industrial, construction and commercial sites into public streets, storm drains and to surface waterbodies and their tributaries; clogged storm drains; faded or missing catch basin stencils and general storm water and BMP information. Hotline and web site information shall be included in the public and business education program and shall be listed in the governmental pages of all regional phone books and on the Permittees' website.

XIII. PERMITTEE FACILITIES AND ACTIVITIES

A. Each Permittee shall inventory its fixed facilities, field operations, and drainage facilities, and shall conduct inspections of these facilities on an annual basis to ensure that these facilities and activities do not contribute pollutants to receiving waters, consistent with the MEP standard. At a minimum, the following municipal facilities, that are owned and/or operated by the Permittees, shall be inspected. Records of these facilities and inspection findings shall be maintained in a database:

1. Public streets, roads (including rural roads) and highways within its jurisdiction;

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2. Parking facilities;
3. Fire fighting training facilities;
4. Flood management projects and flood control structures;
5. Areas or facilities and activities discharging directly to environmentally sensitive areas such as 303(d) listed waterbodies or those with a RARE beneficial use designation;
6. Publicly owned treatment works (including water and wastewater treatment plants)
   a. Sanitary sewage collection systems shall be adequately maintained to minimize overflows, leaks, or other failures (also see requirements in Section IX, above), but need not be inspected annually unless deemed to be necessary;
7. Solid waste transfer facilities;
8. Land application[88] sites;
9. Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
10. Household hazardous waste collection facilities.
11. Municipal airfields.
12. Parks and recreation facilities.
13. Special event venues following special events (festivals, sporting events).
14. Power washing.
15. Other municipal areas and activities that the Permittee determines to be a potential source of pollutants.

B. The Permittees may develop a risk-based scoring system to prioritize Permittee facilities and activities to determine the frequency and scope of inspections, as an alternative to XIII.A, above. If proposed, the scoring system shall consider factors including, but not limited to: the hazardous nature of materials used on site; potential for erosion and pollutant discharges, particularly such materials as pre-production plastic (nurdles) or pollutants for which the receiving water is impaired; site size and location including proximity to receiving water, history of spills and leaks; use of pollution control and prevention measures; and compliance history. The risk-based scoring system shall include a criterion to identify the facilities as high, medium or low risk and shall be submitted to the Executive Officer for approval. The electronic database submitted with the annual report (see X.A.2, above) shall include the risk-based scores for each facility. The facility and/or activity scores must be reviewed and updated annually, if necessary.

C. At least 80% of the inlets, open channels, and basins shall be inspected at least once during each reporting year and cleaned, if necessary, with 100% of the facilities inspected in a two-year period, using the BMP fact sheet developed by the Management Committee. This information shall be included in the annual report.

D. Each Permittee shall clean its drainage facilities where the inspection reveals that the sediment/storage volume is 25% full or greater, or where there is evidence of illegal discharge, or if accumulated sediment or debris impairs the hydraulic capacity of the facility.

[88] Examples are compost application, animal/dairy manure application, and biosolids application

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E. The Permittees' shall evaluate, annually, the inspection and cleanout frequency of drainage facilities, including catch basins, referred to in Section B and C, above. This evaluation shall consider the data generated by historic and ongoing inspections and cleanout of these facilities, and the IC/ID program (Section VIII). The evaluation shall be based on a prioritized list of drainage facilities considering factors such as: proximity to receiving waters, receiving water beneficial uses and impairments of beneficial uses, historical pollutant types and loads from past inspections/cleanings and the presence of downstream regional facilities that would remove the types of pollutants found in the drainage facility. Using this list, the Permittees shall revise their inspection and clean out schedules and frequency and provide justification for any proposed clean out frequency that is less than once a year. This information shall be included in the annual report.

F. Each Permittee shall implement control measures necessary to minimize infiltration of seepage from sanitary sewers to the storm drain systems through routine preventive maintenance of the storm drain system. The Permittees who are also owners and/or operators of sewage collection systems shall also implement a routine maintenance program for the sewage collection systems in accordance with the SSO Order. Each Permittee shall cooperate and coordinate with the appropriate sewage collection agency to swiftly respond to and contain any sewage spills. This control measure and coordination with the sewering agency shall be documented in the LIP.

G. The Permittees shall continue to train its employees in integrated pest management, and pesticide and fertilizer applications.

H. Successful implementation of the provisions in this Order will require the cooperation of many different departments within each Permittee's jurisdiction (e.g., Fire Department, Department of Environmental Health, Planning Department, Transportation Department, Parks and Recreation, Building and Safety, Code Enforcement, etc.) As such, these Permittee departments, programs, or organizations are expected to actively participate in implementing this Order. Other public agency organizations having programs/activities that have an impact on storm water quality are listed in Attachment 3. The Permittees shall ensure that all necessary Permittee departments within their jurisdiction implement their respective requirements as specified in the LIP.

I. Each Permittee shall annually evaluate the information provided to field staff during their maintenance activities to direct public outreach efforts and determine the need for revision of existing maintenance procedures or schedules. The results of this evaluation shall be provided in the annual report.

J. Each Permittee shall include its procedures, schedules, and tools necessary to implement the requirements of this section in its LIP. The LIP shall state the positions responsible for performing and reporting completion of each task and the training requirements for that position.

XIV. MUNICIPAL CONSTRUCTION PROJECTS

A. This Order authorizes the discharge of storm water runoff from construction projects that may result in land disturbance of one (1) acre or more (or less than one acre, if it is part of a larger common plan of development or sale which is one acre or more) that are

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under ownership and/or direct responsibility of any of the Permittees. All Permittee construction activities shall be in accordance with the ROWD and MSWMP.

B. Municipal construction projects shall be in compliance with the latest version of the State's General Permit for Stormwater Discharges Associated with Construction Activities except that an NOI need not be filed with the State Board.

C. Prior to commencement of construction activities, the Permittees shall notify the Executive Officer of the Regional Board of the proposed construction project by submitting a Notice of Intent (NOI), or Permit Registration Documents (PRDs) (web-based) as provided in Attachment 7, and a location map depicting the project location. The filing and annual fees for these NOIs/PRDs are waived for the Permittees.

D. Upon completion of the construction project, the Permittee shall notify the Executive Officer or its designee by submitting: (1) a Notice of Termination (NOT), provided in Attachment 8; (2) photographs of the completed project; (3) a site map depicting the project location and the locations of structural post-construction BMPs, including the latitude and longitude, if appropriate; and (4) copies of the final field verification report. A database of post-construction BMPs for which the Permittees are responsible for shall be developed and referenced in the LIP.

E. The Permittees shall develop and implement a WQMP, if applicable, a storm water pollution prevention plan (SWPPP), a monitoring program that is specific for the construction project prior to the commencement of any of the construction activities, and any other reports or plans required under the General Construction Activity Storm Water Permit. The SWPPP and the WQMP shall be kept at the construction site and released to the public and/or Regional Board staff upon request.

F. The Permittees shall give advance notice to the Executive Officer of the Regional Board of any planned changes in the construction activity, which may result in non-compliance with the latest version of the State's General Construction Activity Storm Water Permit.

G. Emergency Permittee public works projects required to protect public health and safety are exempted from compliance with the requirements of this subsection until the emergency ends, at which time they need to comply with the requirements of this section.

H. All other terms and conditions of the latest version of the State's General Construction Activity Storm Water Permit shall be applicable.

XV. PERMITTEES DE-MINIMUS DISCHARGES

A. The Permittees are authorized to discharge de-minimus types of discharges listed under the latest adopted version of the Regional Board's General De Minimus Discharge Permit, currently Order No. R8-2009-0003. The de-minimus discharges from Permittee owned and/or operated facilities and/or activities shall be in compliance with Order No. R8-2009-0003 except that the Permittees need not pay the filing fee.

B. The Permittees shall notify the Executive Officer of the proposed de-minimus types of discharges at least 15 days prior to start of the discharge, by submitting a NOI and supporting documents, as provided in Attachment 9.

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C. For existing de-minimus dischargers (authorized to discharge under Order No. R8-2009-003 prior to the adoption date of this Order), discharges will continue to be regulated under the terms and conditions of Order No. R8-2003-003 until a new discharge authorization is issued, provided that the discharger submits, no later than June 10, 2010, an updated NOI, a copy of the current Monitoring & Reporting Program previously issued to the discharger, and proposed treatment modifications (if any). If no application for continued discharges are submitted by that date, the discharger shall do one of the following:

i. Cease discharge and submit a letter informing the Regional Board that coverage under Order R8-2009-0003 is no longer needed; or

ii. Apply for new discharge authorization as a new de-minimus discharger, under this Order.

XVI. TRAINING PROGRAM FOR STORM WATER MANAGERS, PLANNERS, INSPECTORS AND MUNICIPAL CONTRACTORS

A. Within 24 months from the date of adoption of this Order, the Principal Permittee, in coordination with the Co-Permittees, will update their existing training program to incorporate new or revised program elements related to the development of the LID program, revised WQMP, and establishment of LIPs for each Permittee. The updated training program includes a training schedule, curriculum content, and defined expertise and competencies for storm water managers, inspectors, maintenance staff, those involved in the review and approval of WQMPs, public works employees, community planners and for those preparing and/or reviewing CEQA documentation and for municipal contractors working on Permittee projects.

1. Within 36 months, the Permittees will update training program elements to incorporate new or enhanced stormwater program elements due for completion within 36 months of permit adoption.

2. By 48 months, the Permittees will have a completely revised training program that includes any enhanced or new program elements not previously addressed, including the WAP.

B. The curriculum content should include: federal, state and local water quality laws and regulations as they apply to construction and grading activities, industrial and commercial activities; the potential effects of construction, industrial and commercial activities and urbanization on water quality; implementation and maintenance of erosion and sediment control BMPs and pollution prevention measures; the proper use and maintenance of erosion and sediment controls; the enforcement protocols and methods established in the MSWMP, LIP, WQMP, including LID Principles and Hydrologic Conditions of Concern, the CASQA Construction Stormwater Guidance Manual, Enforcement Response Guide and Illicit Discharge/Illegal Connection Training Program. The training program should address vector control issues related to storm water pollution control BMPs

C. The training modules for each category of trainees (managers, inspectors, planners, engineers, contractors, public works crew, etc.) should define the required competencies,

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outline the curriculum, and include a testing procedure at the end of the training program and proof of completion of training (Certificate of Completion).

D. At least on an annual basis, the Principal Permittee shall provide and document training to applicable public agency staff on the updated Municipal Activities and Pollution Prevention Strategy (MAPPS), and any other applicable guidance and procedures developed by the Permittees to address Permittee activities in fixed facilities as well as field operations, including conveyance system maintenance. Each Permittee shall document training for its staff related to jurisdiction-specific responsibility, procedures and implementation protocols established in its LIP. The field program training should include Model Integrated Pest Management, pesticide and fertilizer guidelines. Appropriate staff from each municipality shall attend at least three of these training sessions during the term of this Order. The training sessions may be conducted in classrooms or using videos, DVDs, or other multimedia with appropriate documentation and a final test to verify that the material has been properly reviewed and understood. In instances where applicable municipal operations are performed by contract staff, each Permittee shall require evidence that contract staff have received a level of training equivalent to that listed above.

E. The Principal Permittee shall provide and document training for public employees and interested consultants that incorporates at a minimum, the requirements in this Order related to new development and significant re-development and 401 certifications, and model environmental review (CEQA review) for preparation of environmental documents.

F. The Principal Permittee shall provide training information to municipal contractors to assist the contractors in training their staff. In instances where applicable municipal operations are performed by contract staff, the Permittees shall require evidence that contract staff have received a level of training equivalent to that listed above.

G. The Principal Permittee shall either notify designated Regional Board staff regarding training events via e-mail or submit course content in advance of training sessions.

H. Each Permittee shall adequately train any of its staff involved with storm water related projects and the implementation of this Order within six months from being assigned these duties and on an annual basis thereafter, prior to the rainy season.

I. The LIP shall specify the training requirements for Permittee staff and contractor involved in implementing the requirements of this Order. Each Permittee shall maintain a written record of all training provided to its storm water and related program staff.

XVII. NOTIFICATION REQUIREMENTS

A. Within 24 hours of discovery, the Permittees shall provide oral or email notification to the Executive Officer of noncompliant sites within its jurisdiction that are determined to pose a threat to human health or the environment (e.g., an oil spill that could impact wild life, a hazardous substance spill where residents are evacuated, reportable quantities of hazardous substance spills defined in 40 CFR 117 & 302, etc.). Following oral notification, a written report must be submitted to the Executive Officer within 10 days, detailing the nature of the non-compliance, any corrective action taken by the site/facility owner, other relevant information (e.g., past history of non-compliance, environmental damage resulting from the non-compliance, site/facility owner responsiveness) and the

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type of enforcement action that will be carried out by the Permittee. Further, incidences of noncompliance shall be recorded along with the information noted in the written report and the final outcome/enforcement for the incident in the appropriate database.

B. Sewage spill notification shall be consistent with the timelines specified in the SSO Order.

C. All reports submitted by the Permittees as per the requirements in this Order for the approval of the Executive Officer shall be publicly noticed and made available on the Regional Board's website, or through other means, for public review and comments. The Executive Officer shall consider all comments received prior to approval of the reports. Any unresolved issues shall be scheduled for a public hearing at a Regional Board meeting after proper public notice.

D. As specified in Section X.A.7, the Permittees shall deem facilities operating without a proper permit to be in significant non-compliance. These facilities shall be reported within 14 calendar days to the Regional Board by electronic mail or other written means. Permittees' notifications of facilities' failure to obtain required permits under the Construction Activities Storm Water General Permit (Construction Permit), Industrial Activities Storm Water General Permit (Industrial Permit), including Requirements to file a Notice of Intent or No Exposure Certification, Notice of Non-applicability, and/or 401 Certification must include, at a minimum, the following documentation:

1. Name of the facility;
2. Operator of the facility;
3. Owner of the facility;
4. Construction/Commercial/industrial activity being conducted at the facility that is subject to the Construction//Industrial General Permit, or 401 Certification; and
5. Records of communication with the facility operator regarding the violation, including an inspection report.

XVIII. PROGRAM MANAGEMENT ASSESSMENT / MSWMP REVIEW

A. Upon the effective date of this Order, the Permittees shall start implementing the 2007 MSWMP and modify it to be consistent with the requirements of this Order and the schedules contained herein. If major modifications to the 2007 MSWMP not addressed in this Order are determined to be necessary, the Permittees shall prepare and submit MSWMP modifications to the Executive Officer for review and approval. Such modifications may include regional and watershed-specific requirements and/or waste load allocations developed and approved pursuant to the TMDL process.

B. By October 1 of each year, the Permittees shall evaluate the MSWMP to determine the need for any revisions in order to reduce pollutants in MS4 discharges to the maximum extent practicable. In addition, the first annual review after adoption of this Order shall include the following:

1. Review of the formal training needs of municipal employees;

2. Review of coordination meeting/training for the designated NPDES inspectors.; and

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3. Propose any changes to assess program effectiveness on an area-wide and jurisdictional basis. Permittees may utilize the CASQA Guidance[89] for developing these assessment measures at the six outcome levels. The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

C. The annual report shall include the findings of this review and a schedule to address necessary revisions, or a copy of the amended MSWMP with the proposed changes. Replacement pages are acceptable if modifications are not extensive. Annual reports shall also be submitted in electronic format.

D. The Management Committee will continue to meet at least 8 times a year to discuss issues related to permit implementation and regional and statewide issues. Each Permittee's designated representative or a designated alternate should attend not less than 7 of 8 scheduled meetings.

XIX. FISCAL RESOURCES

A. Each Permittee shall exercise its full authority to secure the resources necessary to meet the requirements of this Order. This Order may be revised to adjust time schedules to accommodate prioritization of available resources.

B. The Permittees shall prepare and submit a financial summary to the Executive Officer. The financial summary shall be submitted with the annual report each year and shall, at a minimum, include the following:

1. Each Permittee's expenditures for the previous fiscal year,
2. Each Permittee's budget for the current fiscal year,
3. A description of the source of funds, and
4. Each Permittee's estimated budget for the next fiscal year.

XX. PROVISIONS

A. All reports submitted by the Permittees as per the requirements in this Order for the approval of the Executive Officer shall be publicly noticed and made available on the Regional Board's website, or through other means, for public review and comments. The Executive Officer shall consider all comments received prior to approval of the reports. Any unresolved significant issues shall be scheduled for a public hearing at a Regional Board meeting prior to approval by the Executive Officer.

B. Permittees shall demonstrate compliance with all the requirements in this Order and specifically with Section III. Discharge Limitations, and Section IV. Receiving Water Limitations, through timely implementation of their MSWMP and any modifications, revisions, or amendments developed pursuant to this Order approved by the Executive Officer or determined by the Permittees to be necessary to meet the requirements of this Order. The MSWMP, including any approved amendments thereto is hereby made an enforceable component of this Order.

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[89] CASQA, May 2007. Municipal Stormwater Program Effectiveness Assessment Guidance. January 29, 2010 (Final)

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C. The Permittees shall, at a minimum, implement all elements of the MSWMP and its components. Where the dates are different from the corresponding dates in this Order, the dates in this Order shall prevail. Any proposed revisions to the MSWMP shall be submitted with the Annual Report to the Executive Officer of the Regional Board for review and approval. All approved revisions to the MSWMP shall be implemented as per the time schedules approved by the Executive Officer. In addition to those specific controls and actions required by: (1) the terms of this Order and (2) the MSWMP and its components, each Permittee shall implement additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order.

D. Certain BMPs implemented or required by the Permittees for urban runoff management may create habitat for vectors (e.g., mosquitoes and rodents) if not properly designed and maintained. Close collaboration and cooperative effort between the Permittees and local vector control districts and the State Department of Health Services during the development and implementation of urban runoff management programs are necessary to minimize potential vector habitat and public health impacts resulting from vector breeding. Nothing in this permit is intended to prohibit inspection or abatement of vectors by the State or local vector control agencies in accordance with the respective Health and Safety Code.

E. The Permittees shall comply with Monitoring and Reporting Program No. R8-2010-0036 and any revisions thereto, which are hereby made a part of this Order. The Executive Officer is authorized to revise the Monitoring and Reporting Program to allow the Permittees to participate in regional, statewide, national or other monitoring programs in lieu of or in addition to Monitoring and Reporting Program No. R8-2010-0036.

F. Upon approval by the Executive Officer or the Regional Board, all plans, reports and subsequent amendments required by this Order shall be implemented and shall become an enforceable part of this Order. Prior to approval by the Executive Officer, these plans, reports and amendments shall not be considered as an enforceable part of this Order.

G. The Permittees shall report to the Executive Officer of the Regional Board:

1. Any enforcement actions and discharges of storm or non-storm water, known to the Permittees, which may have an impact on human health or the environment, and

2. Any suspected or reported activities on federal, state, or other entity's land or facilities, where the Permittees do not have any jurisdiction, and where the suspected or reported activities may be contributing pollutants to Waters of the U.S.

H. The permit application and special NPDES program requirements are contained in 40 CFR 122.21 (a), (b), (d)(2), (f), (p); 122.41 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l); and 122.42 (c), and are incorporated into this Order by reference.

XXI. PERMIT MODIFICATION

A. Following appropriate public notice, and in accordance with 40 CFR 122.41(f), this Order may be modified, revoked or reissued prior to its expiration date for the following reasons:

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1. To address significant changes in conditions identified in the technical reports required by the Regional Board which were unknown at the time of the issuance of this Order;
2. To incorporate applicable requirements of statewide water quality control plans adopted by the State Water Resources Control Board or any amendments to the Basin Plan approved by the Regional Board, the State Board and, if necessary, by the Office of Administrative Law and the USEPA;
3. To comply with any applicable requirements, guidelines, or regulations issued or approved under the Clean Water Act, if the requirements, guidelines, or regulations contain different conditions or additional requirements than those included in this Order; or,
4. To incorporate any requirements imposed upon the Permittees through the TMDL process.

B. The filing of a request by the Permittees for modification, revocation and re-issuance, or termination or a notification of planned changes or anticipated noncompliance does not stay any conditions of this Order.

XXII. PERMIT EXPIRATION AND RENEWAL

A. This Order expires on January 29, 2015 and the Permittees must file a Report of Waste Discharge (permit renewal application) no later than 180 days in advance of such expiration date as application for issuance of new waste discharge requirements. The Report of Waste Discharge shall, at a minimum, include the following:

1. A program effectiveness analysis, including the effectiveness of the overall urban and storm water runoff management program in achieving water quality standards in receiving waters.
2. Any proposed revisions to the urban and storm water runoff management program based on the findings of the program effectiveness analysis (this could be included in a revised MSWMP). Revisions to the program elements should be consistent with the risk-based approach proposed in the 2006 Report of Waste Discharge.
3. Changes in land use and/or population including map updates.
4. Any significant changes to the storm drain systems, outfalls, detention or retention basins or dams, and other controls including map updates of the storm drain systems.
5. Any new or revised program elements and compliance schedule(s) necessary to comply with Section VI of this Order.

B. All permit applications (Report of Waste Discharge), annual reports and other information submitted under this Order shall be signed by either a principal executive officer or a ranking elected official (40 CFR 122.22(a)(3)) or a duly authorized representative as per 40 CFR 122.22(b).

C. This Order shall serve as an NPDES Permit pursuant to Section 402 (p) of the Clean Water Act, or amendments thereto, and shall become effective ten days after the date of its adoption provided the Regional Administrator of the USEPA has no objections. If the

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Regional Administrator objects to its issuance, the Permit shall not become effective until such objection is withdrawn.

I, Gerard Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on January 29, 2010.

Gerard J. Thibeault
Executive Officer

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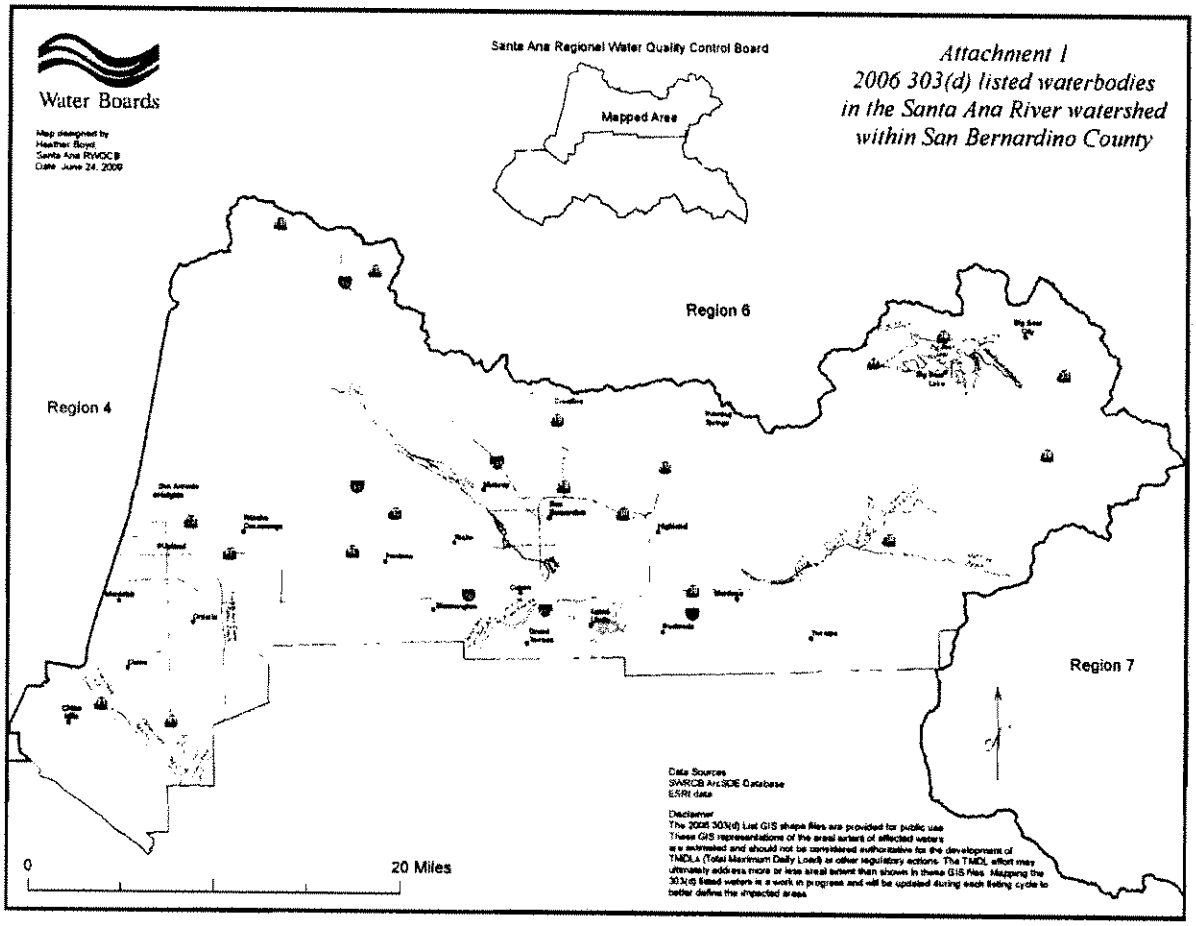
Attachment 1: San Bernardino County Project Area



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Attachment 2: Inland Surface Streams

A. Santa Ana River

Santa Ana River, Reaches 4, 5, and 6

B. San Bernardino Mountain Streams

Mill Creek Drainage

- Mill Creek, Reaches 1 and 2
- Mountain Home Creek
- Mountain Home Creek, East Fork
- Monkey Face Creek
- Alger Creek
- Falls Creek
- Vivian Creek
- High Creek
- Other Tributaries: Lost, Oak Cove, Green, Skinner, Momyer and Glen Martin Creeks, and other Tributaries to these Creeks

Bear Creek Drainage

- Bear Creek
- Siberia Creek
- Slide Creek
- All Other Tributaries to these Creeks

Big Bear Lake Tributaries

- North Creek
- Metcalf Creek
- Grout Creek
- Rathbone (Rathbun) Creek
- Summit Creek
- Other Tributaries to Big Bear Lake: Johnson, Minnelusa, Polique, and Red Ant Creeks, and other Tributaries to these Creeks

Baldwin Lake Drainage

- Shay Creek
- Other Tributaries to Baldwin Lake: Sawmill, Green, and Caribou Canyons and other Tributaries to these Creeks.

C. Other Streams Draining to Santa Ana River (Mountain Reaches)

- Cajon Creek
- City Creek
- Devil Canyon Creek
- East Twin and Strawberry Creeks
- Waterman Canyon Creek
- Fish Creek
- Forsee Creek
- Plunge Creek
- Barton Creek

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Bailey Canyon Creek
Kimbark Canyon, East Fork Kimbark Canyon, Ames Canyon and West Fork Cable Canyon Creeks
Valley Reaches of Above Streams
Other Tributaries (Mountain Reach): Alder, Badger Canyon, Bledsoe Gulch, Borea Canyon, Breakneck, Cable Canyon, Cienega Seca, Cold, Converse, Coon, Crystal, Deer, Elder, Fredalba, Frog, Government, Hamilton, Heart Bar, Hemlock, Keller, Kilpecker, Little Mill, Little Sand Canyon, Lost, Meyer Canyon, Mile, Monroe Canyon, Oak, Rattlesnake, Round Cienega, Sand, Schneider, Staircase, Warm Springs Canyon and Wild Horse Creeks, and other tributary to these Creeks

D. San Gabriel Mountain Streams (Mountain Reaches)

San Antonio Creek
Lytle Creek (South, Middle, and North Forks) and Coldwater Canyon Creek
Day and East Etiwanda Creeks
Valley Reaches of Above Streams
Cucamonga Creek (Mountain Reach)
Cucamonga Creek (Valley Reach)
Other Tributaries (Mountain Reaches): San Sevaine, Deer, Duncan Canyon, Henderson Canyon, Stoddard Canyon, Icehouse Canyon, Cascade Canyon, Cedar, Falling Rock, Kerkhoff and Cherry Creeks, and other tributaries to these Creeks.

E. San Timoteo Area Streams

San Timoteo Creek, Reaches 1 and 2
Oak Glen, Potato Canyon and Birch Creeks
Yucaipa Creek

F. Prado Area Streams

Chino Creek

G. Lakes and Reservoirs

Baldwin Lake
Big Bear Lake
Jenks Lake
Prado Park Lakes

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Attachment 3: List of Other Entities with the Potential to Discharge Pollutants to the San Bernardino County Storm Water Conveyance System

A. Government Agencies

U.S. Army Corps of Engineers
U.S. Department of Agriculture - Forest Services, San Bernardino County National Forest
California Department of Transportation (Cal Trans)
California Department of Parks and Recreation - Chino Hills State Park
Inland Valley Development Agency, San Bernardino International Trade Center and Airport

B. Hospitals

Bear Valley Community Hospital
Chino Community Hospital
Doctors Hospital
Kaiser Foundation Hospital
Loma Linda Community Hospital
Loma Linda University Medical Center
Mountains Community Hospital
Ontario Community Hospital
Patton State Hospital
U.S. Department of Veterans Affair - Jerry L. Pettis Memorial Veterans Medical Center
Redlands Community Hospital
St. Bernardino Medical Center
San Antonio Community Hospital
San Bernardino Community Hospital
San Bernardino County Hospital

C. Railroads

AT&SF Railway Company
Union Pacific Railroad Company
BNSF Railway Company

D. School Districts

Alta Loma Elementary School District
Bear Valley Unified School District
Central Elementary School District
Chaffey Joint Union High School District
Chino Valley Unified School District
Colton Joint Unified School District
Cucamonga Elementary School District
Etiwanda Elementary School District
Fontana Unified School District
Mountain View Elementary School District

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Mt. Baldy joint Elementary School District
Ontario-Montclair Elementary School District
Rialto Unified School District
Rim of the World Unified School District
Redlands Unified School District
San Bernardino City Unified School District
Upland Unified School District
Yucaipa Joint Unified School District

E. **Universities and Colleges**

California State University - California State University San Bernardino
San Bernardino Community College District - Chaffey College Campus
San Bernardino Community College District - Crafton Hills College Campus
San Bernardino Community College District - San Bernardino Valley College Campus
University of Redlands
Loma Linda University

F. **Water Districts**

Big Bear Municipal Water District
Bear Valley Water District
Inland Empire Utilities Agency
Cucamonga Valley Water District
East Valley Water District
Monte Vista Water District
San Bernardino Valley Municipal Water District
San Bernardino Valley Water Conservation District
West San Bernardino County Water District
Yucaipa Valley Water District

G. **Transportation**

Omnitrans
Metrolink (Fontana, Montclair, Ontario, Rancho Cucamonga, Rialto, San Bernardino)
Ontario International Airport (LA/ONT)
Redlands Municipal Airport
Rialto Municipal Airport
Chino Airport
Cable Airport

H. **Other Potential Dischargers**

United States Postal Service
California National Guard
Southern California Edison

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Attachment 4: Glossary

Basin Plan – Water Quality Control Plan developed by the Regional Board for the Santa Ana River Watershed.

Beneficial Uses – The uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote the tangible and intangible economic, social, and environmental goals. "Beneficial Uses" that may be protected against include, but are not limited to: domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. "Beneficial Uses" are equivalent to "Designated Uses" under federal law. [California Water Code Section 13050(f)]. Beneficial Uses for the Receiving Waters are identified in the Basin Plan.

Best Available Technology (BAT) – BAT is the acronym for best available technology economically achievable. BAT is the technology-based standard established by congress in CWA section 402(p)(3)(A) for industrial dischargers of storm water. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices, or BMPs. For example, secondary treatment (or the removal of 85% suspended solids and BOD) is the BAT for suspended solid and BOD removal from a sewage treatment plant. BAT generally emphasizes treatment methods first and pollution prevention and source control BMPs secondarily.

The best economically achievable technology that will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants is determined in accordance with regulations issued by the Environmental Protection Agency Administrator. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the permitting authority deems appropriate.

Best Conventional Technology (BCT) – BCT is an acronym for Best Conventional Technology. BCT is the treatment techniques, processes and procedure innovations, and operating methods that eliminate or reduce chemical, physical, and biological pollutant constituents.

Best Management Practices – Best Management Practices (BMPs) are defined in 40 CFR 122.2 as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. In the case of municipal storm water permits, BMPs are typically used in place of numeric effluent limits.

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Bioaccumulate – The progressive accumulation of contaminants in the tissues of organisms through any route including respiration, ingestion, or direct contact with contaminated water, sediment, pore water, or dredged material to a higher concentration than in the surrounding environment. Bioaccumulation occurs with exposure and is independent of the tropic level.

Bioassessment - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biological integrity) of a water body.

Biological Integrity – Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. Environmental Management 5:55-68 as: "A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region." Also referred to as ecosystem health.

CalTrans - California Department of Transportation

CEQA – California Environmental Quality Act (Section 21000 et seq. of the California Public Resources Code).

Clean Water Act Section 402(p) – [33 USC 1342(p)] is the federal statute requiring municipal and industrial dischargers to obtain NPDES permits for their discharges of storm water.

Clean Water Act Section 303(d) Listed Water Body – is an impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology-based pollution controls required by the CWA. The discharge of urban runoff to these water bodies by the Co-permittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Construction Site – Any project, including projects requiring coverage under the General Construction Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, disturbances to ground such as stockpiling, and excavation

Contamination – As defined in the Porter-Cologne Water Quality Control Act, contamination is "an impairment of the quality of waters of the State by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease." 'Contamination' includes any equivalent effect resulting from the disposal of waste whether or not Waters of the U.S. are affected.

Criteria - The numeric values and the narrative standards that represent contaminant concentrations that are not to be exceeded in the receiving environmental media (surface water, ground water, sediment) to protect beneficial uses.

CWA – Federal Clean Water Act

CWC – California Water Code

Debris – Debris is defined as the remains of anything destroyed or broken, or accumulated loose fragments of rock.

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Development Projects - New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision.

Dry Season – June 1 through September 30 of each year, unless specified otherwise in an approved TMDL Implementation Plan.

Effluent Limitations – Means any restriction on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into Waters of the United States, waters of the "contiguous zone," or the ocean. (40 CFR §122.2)

Environmentally Sensitive Areas (ESAs) - Areas that include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Resources Control Board (Water Quality Control Plan for the Santa Ana River Basin (1994) and amendments); water bodies designated with the RARE beneficial use by the State Water Resources Control Board (Water Quality Control Plan for the Santa Ana River Basin (1994) and amendments); areas designated as preserves or their equivalent under the Natural Communities Conservation Program (Multiple Species Habitat Conservation Plan, MSHCP) within the Cities and County of San Bernardino; and any other equivalent environmentally sensitive areas which have been identified by the Co-Permittees.

Erosion – The process whereby material (such as sediment) is detached and entrained in water or air and can be transported to a different location. Chemical erosion involves materials that are dissolved and removed and transported.

GIS - Geographical Information Systems

Grading – The cutting and/or filling of the land surface to a desired slope or elevation.

Green Infrastructure - Generally refers to technologically feasible and cost-effective systems and practices that use or mimic natural processes to infiltrate, evapotranspirate, or use stormwater or runoff on the site where it is generated. Green infrastructure is used interchangeably with low impact development (LID). See LID.

Hazardous Material – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the U.S. EPA to be reported if a designated quantity of the material is spilled into the waters of the United States or emitted into the environment.

HCOC – Hydrologic Condition of Concern – Condition when a proposed hydrologic change is deemed to have the potential to cause significant impacts on downstream channels and aquatic habitats, alone or in conjunction with impacts of other projects.

Hydromodification – the "alteration of the hydrologic characteristics of coastal and non-coastal waters, which in turn could cause degradation of water resources"[90](USEPA, 2007).

[90] United States Environmental Protection Agency. 2007. National Management Measures to Control Nonpoint Source Pollution from Hydromodification. EPA-841-B-07-002.

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The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that may result in increased stream flows and sediment transport.

IC/ID – Illicit Connection/Illegal Discharge

Illicit Connection – Illicit Connection means any connection to the MS4 that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations.

Illicit Discharge – Any discharge to a municipal separate storm sewer that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term illicit discharge includes all non-storm water discharges except discharges pursuant to an NPDES permit, discharges that are identified in Section V, Effluent Limitations and Discharge Specifications, of this Order, and discharges authorized by the Regional Board.

Impaired Waterbody – Section 303(b) of the CWA requires each of California's Regional Water Quality Control Boards to routinely monitor and assess the quality of waters of their respective regions. If this assessment indicates that Beneficial Uses are not met, then that waterbody must be listed under Section 303(d) of the CWA as an Impaired Waterbody.

Isopluvial - A line on a map drawn through geographical points having the same pluvial (rain, precipitation) index.

Land Disturbance – The clearing, grading, excavation, stockpiling, or other construction activity that results in the possible mobilization of soils or other Pollutants into the MS4. This specifically does not include routine maintenance activity to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. This also does not include emergency construction activities required to protect public health and safety. The Permittees should first confirm with Regional Board staff if they believe that a particular routine maintenance activity is exempt under this definition from the General Construction Activity Storm Water Permit or other Orders issued by the Regional Board.

Load Allocations (LA) – Distribution or assignment of TMDL Pollutant loads to entities or sources for existing and future nonpoint sources, including background loads.

Local Implementation Plan - Document describing an individual Permittee's implementation procedures for compliance with the MS4 Permit, including ordinances, databases, plans, and reporting materials.

Low Impact Development (LID) – A storm water management and land development strategy that combines a hydrologically functional site design with pollution prevention measures to compensate for land development impacts on hydrology and water quality. LID techniques mimic the site predevelopment site hydrology by using site design techniques that store, infiltrate, evapotranspire, bio-filter or detain runoff close to its source

MEP (Maximum Extent Practicable) - Is not defined in the CWA; it refers to management practices, control techniques, and system design and engineering methods for the control of pollutants taking into account considerations of synergistic, additive, and competing factors, including, but not limited to pollutant removal effectiveness, regulatory compliance, gravity of the problem, public acceptance, social benefits, cost and technological feasibility.

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MEP is the technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control BMPs. MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead, the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their urban runoff management programs. Their total collective and individual activities conducted pursuant to the urban runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the Regional Board, the Regional Board defines MEP.

Municipal Storm Water Conveyance System – (See Municipal Separate Storm Sewer System or MS4).

Municipal Separate Storm Sewer System (MS4) – MS4 is an acronym for Municipal Separate Storm Sewer System. A Municipal Separate Storm Sewer System is a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains): (i) Owned or operated by a State, city town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes; (ii) Designated or used for collecting of conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

National Pollution Discharge Elimination System (NPDES) – A national program under Section 402 of the Clean Water Act for regulation of discharges of pollutants from point sources to waters of the United States. Discharges are illegal unless authorized by an NPDES permit.

NOI [Notice of Intent] – A NOI is an application for coverage under the General Stormwater Permits.

Non-Point Source Pollution (NPS) – Non point source refers to diffuse, widespread sources of pollution. These sources may be large or small, but are generally numerous throughout a watershed. Non Point Sources include but are not limited to urban, agricultural, or industrial areas, roads, highways, construction sites, communities served by septic systems, recreational boating activities, timber harvesting, mining, livestock grazing, as well as physical changes to stream channels, and habitat degradation. NPS pollution can occur year round any time rainfall, snowmelt, irrigation, or any other source of water runs over land or through the ground, picks up pollutants from these numerous, diffuse sources and deposits them into rivers, lakes, and coastal waters or introduces them into ground water.

Non-Storm Water – Non-storm water consists of all discharges to and from a storm water conveyance system that do not originate from precipitation events (i.e., all discharges from a

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conveyance system other than storm water). Non-storm water includes illicit discharges, non-prohibited discharges, and NPDES permitted discharges.

NOT - Notice of Termination – Formal notice to the Regional Board of intent to terminate water discharge for projects covered under a General Stormwater Permit.

Nuisance – As defined in the Porter-Cologne Water Quality Control Act a nuisance is "anything which meets all of the following requirements: 1) Is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. 2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. 3) Occurs during, or as a result of, the treatment or disposal of wastes."

Numeric Effluent Limitations – A quantitative limitation on pollutant concentrations or levels to protect beneficial uses and water quality objectives of a water body.

Nurdles – A plastic pellet (typically less than 5 mm diameter) also known as pre-production plastic pellet or plastic resin pellet.

Open Space - Any parcel or area of land or water that is essentially unimproved or devoted to an open-space use for the purposes of (1) the preservation of natural resources, (2) the managed production of resources, (3) outdoor recreation, or (4) public health and safety. [Riverside County General Plan, adopted October 7, 2003. Technical Appendix A , Glossary]

Order – Order No. R8-2010-0036 (NPDES No. CAS618036)

Outfall - Means a Point Source as defined by 40 CFR 122.2 a, the point where a municipal separate storm sewer discharges to Waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels, or other conveyances which connect segments of the same stream or other Waters of the United States and are used to convey Waters of the United States. [40 CFR 122.26 (b)(9)]

PAH (Polycyclic aromatic hydrocarbon) – are hydrocarbons that consist of fused aromatic rings. PAHs occur in oil, coal, and tar deposits, and are produced as byproducts of fuel burning (whether fossil fuel or biomass). PAHs are persistent, bioaccumulative, and toxic (PBT) pollutants. Though exposure usually occurs by breathing contaminated air, other sources include industrial processes, transportation, energy production and use, and disposal activities.

PCBs - Polychlorinated biphenyls. Due to PCB's toxicity and classification as persistent organic pollutants, PCB production was banned by the United States Congress in 1976 and by the Stockholm Convention on Persistent Organic Pollutants in 2001.

Party – Defined as an individual, association, partnership, corporation, municipality, state or federal agency, or an agent or employee thereof. [40 CFR 122.2]

Permittees – Co-permittees and the Principal Permittee

Person – A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof. [40 CFR122.2].

Point Source – Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, landfill leachate collection systems, vessel, or other

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floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

Pollutant – Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated. It includes any type of industrial, municipal, and agricultural waste discharged into water. The term "pollutant" is defined in section 502(6) of the Clean Water Act as follows: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." It has also been interpreted to include water characteristics such as toxicity or acidity.

Pollutants of Concern – A list of potential pollutants to be analyzed for in the Monitoring and Reporting Program. This list shall include: TSS, total inorganic nitrogen, total phosphorus, soluble reactive phosphorus, acute toxicity, fecal coliform, total coliform, pH, and chemicals/potential Pollutants expected to be present on the project site. In developing this list, consideration should be given to the chemicals and potential Pollutants available for storm water to pick-up or transport to Receiving Waters, all Pollutants for which a waterbody within the Permit Area that has been listed as impaired under CWA Section 303(d)), the category of development and the type of Pollutants associated with that development category. It also refers to pollutants for which water bodies are listed as impaired under CWA section 303(d), pollutants associated with the land use type of a development, and/or pollutants commonly associated with urban runoff. Pollutants commonly associated with urban runoff include total suspended solids; sediment; pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc, and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers); oxygen-demanding substances (decaying vegetation, animal waste, and anthropogenic litter).

Pollution – As defined in the Porter-Cologne Water Quality Control Act, pollution is "the alteration of the quality of the Waters of the U.S. by waste, to a degree that unreasonably affects either of the following: 1) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses." Pollution may include contamination.

Pollution Prevention – Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control, treatment, or disposal.

Post-Construction BMPs – A subset of BMPs including structural and non-structural controls which detain, retain, filter, or educate to prevent the release of pollutants to surface waters during the final functional life of development.

POTW [Publicly Owned Treatment Works] – Wastewater treatment facilities owned by a public agency.

Principal Permittee – San Bernardino County Flood Control District

Priority Development Projects - New development and redevelopment project categories listed in Section XI.D.4 of Order No. R8-2010-0036.

Rainy Season – October 1 through May 31st of each year.

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Receiving Waters – Waters of the United States within the Permit area.

Receiving Water Limitations – Waste discharge requirements issued by the SARWQCB typically include both: (1) "Effluent Limitations" (or "Discharge Limitations") that specify the technology-based or water-quality-based effluent limitations; and (2) "Receiving Water Limitations" that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the "Receiving Water Limitations" provision is the provision used to implement the requirement of CWA section 301(b)(1)(C) that NPDES permits must include any more stringent limitations necessary to meet water quality standards.

Redevelopment - The creation, addition, and or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition to or replacement of a structure, and creation or addition of impervious surfaces. Replacement of impervious surfaces includes any activity that is not part of a routine maintenance activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include trenching and resurfacing associated with utility work; resurfacing and reconfiguring surface parking lots and existing roadways; new sidewalk construction, pedestrian ramps, or bike lane on existing roads; and routine replacement of damaged pavement, such as pothole repair.

Sediment – Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

SIC [Standard Industrial Classification] – Four digit industry code, as defined by the US Department of Labor, Occupational Safety and Health Administration. The SIC Code is used to identify if a facility requires coverage under the General Industrial Activities Storm Water Permit.

Significant Redevelopment –The addition or creation of 5,000, or more, square feet of impervious surface on an existing developed site. This includes, but is not limited to, construction of additional buildings and/or structures, extension of the existing footprint of a building, construction of impervious or compacted soil parking lots. Significant Redevelopment does not include routine maintenance activities that are conducted to maintain original line and grade, hydraulic capacity, the original purpose of the constructed facility or emergency actions required to protect public health and safety.

Site Design BMPs – Any project design feature that reduces the creation or severity of potential pollutant sources or reduces the alteration of the project site's hydrology. Redevelopment projects that are undertaken to remove pollutant sources (such as existing surface parking lots and other impervious surfaces) or to reduce the need for new roads and other impervious surfaces (as compared to conventional or low-density new development) by incorporating higher densities and/or mixed land uses into the project design, are also considered site design BMPs.

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Small Municipal Separate Storm Sewer System (Small MS4)[91] – A conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) that are:

(i) Owned or operated by the United States, a State, city, town, boroughs, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewer systems

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings. (40 CFR §122.26(b)(16))

Source Control BMPs – In general, activities or programs to educate the public or provide low cost non-physical solutions, as well as facility design or practices aimed to limit the contact between Pollutant sources and storm water or authorized Non-Storm Water. Examples include: activity schedules, prohibitions of practices, street sweeping, facility maintenance, detection and elimination of IC/IDs, and other non-structural measures. Facility design (structural) examples include providing attached lids to trash containers, canopies for fueling islands, secondary containment, or roof or awning over material and trash storage areas to prevent direct contact between water and Pollutants.

Southern California Stormwater Monitoring Coalition (SMC)

State Board – California State Water Resources Control Board

Storm Water – Per 40 CFR 122.26(b)(13), means storm water runoff, snowmelt runoff and surface runoff and drainage.

Storm Water General Permits – General Permit-Industrial (State Board Order No. 97-03 DWQ, NPDES No. CAS000001), General Permit-Construction (State Board Order No. 99-08 DWQ, NPDES No. CAS000002), and General Permit-Small Linear Underground Projects (State Board Order No. 2003-0007-DWQ, NPDES No. CAS000005).

Structural BMPs – Physical facilities or controls that may include secondary containment, treatment measures, (e.g. first flush diversion, detention/retention basins, and oil/grease separators), run-off controls (e.g., grass swales, infiltration trenches/basins, etc.), and engineering and design modification of existing structures.

SWAMP (Surface Water Ambient Monitoring Program)

SWPPP [Storm Water Pollution Prevention Plan] – Plan to minimize and manage Pollutants to minimize Pollution from entering the MS4, identifying all potential sources of Pollution and describing planned practices to reduce Pollutants from discharging off the site.

[91] State Water Resources Control Board (SWRCB) Water Quality Order No. 2003-005-DWQ, Waste Discharge Requirements for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (General Permit)

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TDS – Total dissolved solids.

Time of concentration - the time that it takes for storm runoff to travel from the most hydraulically remote point of the watershed to the outlet.

Total Maximum Daily Load (TMDL) – The TMDL is the maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under Clean Water Act Section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

TMDL Implementation Plan -- Component of a TMDL that describes actions, including monitoring, needed to reduce Pollutant loadings and a timeline for implementation. TMDL Implementation Plans can include a monitoring or modeling plan and milestones for measuring progress, plans for revising the TMDL if progress toward cleaning up the waters is not made, and the date by which Water Quality Standards will be met (USEPA Final TMDL Rule: Fulfilling the Goals of the CWA, EPA 841-F-00-008, July 2000).

Toxicity – Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies.

Treatment Control BMPs – Any engineered system designed and constructed to remove pollutants from urban runoff. Pollutant removal is achieved by simple gravity settling of particulate pollutants, filtration, biological uptake, media adsorption or any other physical, biological, or chemical process.

TSS – Total suspended solids.

Urban Runoff – Urban runoff is defined as all flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) authorized non-storm water discharges (See Section V of the Order) (dry weather flows).

USEPA – United States Environmental Protection Agency

Waste – As defined in California Water Code Section 13050(d), "waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system which applies to solid and semi-solid waste which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, nonhazardous solid waste, and inert waste.

Waste Discharge Requirements – As defined in Section 13374 of the California Water Code, the term "Waste Discharge Requirements" is the equivalent of the term "permits" as used in the Federal Water Pollution Control Act, as amended. The Regional Board usually reserves reference to the term "permit" to Waste Discharge Requirements for discharges to surface Waters of the U.S.

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Waste Load Allocations (WLA) – Maximum quantity pollutants a discharger of waste is allowed to release into a particular waterway, as set by a regulatory authority. Discharge limits usually are required for each specific water quality criterion being, or expected to be, violated. Distribution or assignment of TMDL Pollutant loads to entities or sources for existing and future point sources.

Water Quality Assessment – Assessment conducted to evaluate the condition of non-storm water and storm water discharges, and the water bodies which receive these discharges.

Water Quality-Based Effluent Limits (WQBEL) - A value determined by selecting the most stringent of the effluent limits calculated using all applicable water quality criteria (e.g., aquatic life, human health, and wildlife) for a specific point source to a specific receiving water for a given pollutant.

Water Quality Criteria - comprised of numeric and narrative criteria. Numeric criteria are scientifically derived ambient concentrations developed by EPA or states for various pollutants of concern to protect human health and aquatic life. Narrative criteria are statements that describe the desired water quality goal.

Water Quality Objective – The limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area. [California Water Code Section 13050(h)]

Water Quality Standards – are defined as the beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.,) of water and the water quality objectives necessary to protect those uses.

Waters of the United States – Waters of the United States can be broadly defined as navigable surface waters and all tributary surface waters to navigable surface waters. Groundwater is not considered to be a Waters of the United States.

As defined in 40 CFR 122.2, the Waters of the U.S. are defined as: (a) All waters, which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition: (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.

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Watershed – That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

WDID [Waste Discharge Identification] – Identification number provided by the State when a Notice of Intent is filed.

WQMP – Water Quality Management Plan. A plan developed to mitigate the impacts of urban runoff from Priority Development Projects.

Wet Season – October 1 through May 31st of each year, except where specifically defined otherwise in an approved TMDL Implementation Plan.

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EXHIBIT B

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SANTA ANA REGION

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT

AND

WASTE DISCHARGE REQUIREMENTS

NPDES NO. CAS618036

ORDER NO. R8-2002-0012

FOR

THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, THE COUNTY OF SAN BERNARDINO, AND THE INCORPORATED CITIES OF SAN BERNARDINO COUNTY WITHIN THE SANTA ANA REGION

AREA-WIDE URBAN STORM WATER RUNOFF

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Regional Board), finds that:

1. The 1987 amendments to the Clean Water Act (CWA) added Section 402(p) that establishes a framework for regulating municipal and industrial (including construction) storm water discharges under the National Pollutant Discharge Elimination System (NPDES) permit. Section 402(p) of the CWA requires NPDES permits for storm water discharges from municipal separate storm sewer systems (MS4), as well as other designated storm water discharges that are considered significant contributors of pollutants to waters of the United States. On November 16, 1990, the United States Environmental Protection Agency (hereinafter EPA) published Phase I regulations (40 CFR Parts 122, 123 and 124), which describe permit application requirements for storm water discharges.

2. Prior to EPA's promulgation of the Phase I storm water regulations, the three counties (Orange, Riverside, and San Bernardino) and the incorporated cities within the jurisdiction of the Santa Ana Regional Board requested areawide NPDES permits for urban storm water runoff. On October 19, 1990, the Regional Board adopted Order No. 90-136 for urban storm water runoff from urban areas in San Bernardino County within the Santa Ana Region. The San Bernardino County Flood Control District was named as the principal permittee and San Bernardino County and the incorporated cities were named as the co-permittees. Order No 96-32, issued by the Regional Board on March 8, 1996, renewed the permit for another five years.

3. Order No. 96-32 expired on March 1, 2001. On September 1, 2000, the San Bernardino County Flood Control District (SBCFCD), in cooperation with the County of San Bernardino, and the incorporated cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Rancho Cucamonga, Redlands, Rialto, San Bernardino, Upland, and Yucaipa (hereinafter collectively referred to as "permittees" or dischargers) jointly submitted NPDES Application No. CAS618036 and a Report of Waste Discharge for reissuance of their area-wide storm water permit for urban storm water runoff. The Report of Waste Discharge was submitted in accordance with Section V.29

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of the previous NPDES permit (Order No. 96-32) as application for permit renewal. In order to more effectively carry out the requirements of this Order, the permittees agreed that the San Bernardino County Flood Control District (SBCFCD) would continue as the principal permittee and San Bernardino County and the incorporated cities would be co-permittees. On March 2, 2001, Order No. 96-32, NPDES No. CAS618036, was administratively extended in accordance with 40 CFR Part 122.6 and Title 23, Division 3, Chapter 9, §2235.4 of the California Code of Regulations.

4. Within the Santa Ana Region, the permittees serve a population of approximately 1.33 million, occupying an area of approximately 985 square miles. The latest figures obtained from the Reconnaissance Progress Report estimated 384 miles of above-ground and 334 miles of below-ground storm drain channels in the project area. Approximately seven percent (7%) of the San Bernardino County area drains into water bodies within this Regional Board's jurisdiction. The project area is shown on Attachment 1. Approximately 50% of the remaining San Bernardino County drainage areas are within the jurisdiction of the Lahontan Regional Board and the other 43% is within the jurisdiction of the Colorado River Basin Regional Board. However, urbanization in those areas is minimal compared to areas within the Santa Ana Regional Board's jurisdiction.

5. Runoff from the San Bernardino County drainage areas is generally conveyed to the Riverside County drainage areas through the Santa Ana River or other drainage channels tributary to the Santa Ana River. These flows are then discharged to Reach 2 of the Santa Ana River through Prado Basin (Reach 3 of the Santa Ana River). Most of the flow in Reach 2 is recharged in Orange County. During wet weather, some of the flow may be discharged to the Pacific Ocean through Reach 1 of the Santa Ana River.

6. The Santa Ana River Basin is the major watershed within this Region. This watershed is divided into the lower Santa Ana River, middle Santa Ana River, Chino basin, upper Santa Ana and Big Bear Lake watersheds. The lower Santa Ana River Basin (downstream from Prado Dam) includes the Orange County drainage areas, and the rest of the Santa Ana River Basin includes the San Bernardino County and the Riverside County drainage areas. The San Bernardino County drainage areas are generally upstream of the Riverside County drainage areas. Some of the main surface water bodies in San Bernardino County within areas regulated under this Order include:

   a. Santa Ana River, Reaches 4, 5, and 6,

   b. Cucamonga Creek,

   c. San Sevaine Channel,

   d. Lytle Creek,

   e. San Timoteo Creek,

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f. Bear Creek,

g. Mill Creek (in San Bernardino area).

Surface water bodies in San Bernardino County within the jurisdiction of Santa Ana Region are listed in Attachment 2.

7. The beneficial uses of these water bodies include municipal and domestic supply, agricultural supply, industrial service supply, groundwater recharge, hydropower generation, water contact recreation, non-contact water recreation, and sportfishing, warm freshwater habitat, cold freshwater habitat, preservation of biological habitats of special significance, wildlife habitat and preservation of rare, threatened or endangered species. The ultimate goal of this storm water management program is to protect the beneficial uses of the receiving waters.

8. The three county areas within this Region are regulated under three area-wide permits for urban storm water runoff. These area-wide NPDES permits are:

   a. Orange County, NPDES No. CAS618030,

   b. Riverside County, NPDES No. CAS618033, and

   c. San Bernardino County, NPDES No. CAS618036.

   For an effective watershed management program, coordination among the regulators, the municipal permittees, the public, and other entities is essential.

9. Studies conducted by the EPA, the states, flood control districts and other entities indicate the following major sources for urban storm water pollution nationwide:

   a. Industrial sites where appropriate pollution control and best management practices (BMPs)[1] are not implemented;

   b. Construction sites where erosion and siltation controls and BMPs are not implemented; and

   c. Urban runoff where the drainage area is not properly managed.

10. A number of permits were adopted to address pollution from the sources identified in Finding 9, above. The State Board issued two statewide general NPDES permits: one for storm water runoff from industrial activities (NPDES No. CAS000001, General Industrial Activities Storm Water Permit) and the second one for storm water runoff from construction sites (NPDES No. CAS000002, General Construction Activity Storm Water Permit). Industrial activities (as identified in 40 CFR 122.26(b)(14) and construction sites on five acres or more, are required to obtain coverage under these statewide general permits. The permittees have developed project conditions of approval requiring coverage

[1] Best Management Practices (BMPs) are water quality management practices that are maximized in efficiency for the control of storm water runoff pollution.

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under the State's General Permit for new developments to be implemented at the time of grading or building permit issuance for construction sites on five acres or more and at the time of local permit issuance for industrial facilities. The State Board also adopted Order No. 99-06-DWQ, NPDES No. CAS000003, for storm water runoff from facilities owned and/or operated by Caltrans (including freeways and highways). The Regional Board adopted Order 99-11, NPDES No. CAG018001, for concentrated animal feeding operations, including dairies. The Regional Board also issues individual storm water permits for certain industrial facilities within the Region. Currently there are 22 individual storm water NPDES permits in the Region; 10 of these facilities are located in the San Bernardino County area. Additionally, for a number of facilities that discharge process wastewater and storm water, storm water discharge requirements are included with their facilities' NPDES permit for process wastewater.

11. In most cases, the industries and construction sites covered under the Statewide General Industrial and Construction Permits discharge into storm drains and/or flood control facilities owned and operated by the permittees. These industries and construction sites are also regulated under local laws and regulations. Furthermore, the permittees authorize and permit developments within their jurisdiction, and they own, operate, and control the MS4 systems. The permittees approve residential, commercial, and industrial developments, and cause urbanization of the area and also benefit from it. Therefore, they have a responsibility to address any water quality problems resulting from this urbanization. The Regional Board administers compliance with the State's General Industrial Activities Storm Water Permit and the General Construction Activity Storm Water Permit. A coordinated effort between the permittees and the Regional Board staff is critical to avoid duplicative and overlapping efforts when overseeing the compliance of dischargers covered under the Statewide General Permits. As part of this coordination, the permittees have been notifying Regional Board staff when during their routine activities, they observe conditions that pose a threat or potential threat to water quality, or an industrial facility or construction activity that has failed to obtain coverage under the appropriate general storm water permit.

12. This Order regulates urban storm water runoff[2] from areas under the jurisdiction of the permittees. The term storm water as used in this Order includes storm water runoff, snowmelt runoff, and surface runoff and drainage. The permittees have jurisdiction over and/or maintenance responsibility for storm water conveyance systems within San Bernardino County. The permittees may lack legal jurisdiction over storm water discharges into their systems from some of the State and federal facilities, utilities and special districts, Native American tribal

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[2] Urban storm water runoff includes those discharges from residential, commercial, industrial and construction areas within the permitted area and excludes discharges from feedlots, dairies and farms.

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lands, waste water management agencies and other point and non-point source discharges otherwise permitted by the Regional Board. The Regional Board recognizes that the permittees should not be held responsible for such facilities and/or discharges.

13. Certain activities that generate pollutants present in storm water runoff may be beyond the ability of the permittees to eliminate. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography. This Order is intended to regulate the discharge of pollutants in urban storm water runoff from anthropogenic (generated from human activities) sources and is not intended to address background or naturally occurring pollutants or flows.

14. A major portion of San Bernardino County within the Santa Ana Regional Board jurisdiction is being urbanized with residential, commercial, and industrial developments. Urban development increases impervious surfaces and storm water runoff volume and velocity; and decreases vegetated pervious surface available for infiltration of storm water. Increase in runoff volume and velocity may cause scour, erosion (sheet, rill and/or gully), aggradation (raising of a streambed from sediment deposition), changes in fluvial geomorphology, hydrology, and changes in aquatic ecosystem. The local agencies (the permittees) are the owners and operators of the MS4 systems and have authority to control discharges to these systems. The permittees have established appropriate legal authority to control discharges into their respective MS4 systems. They adopted grading and/or erosion control ordinances, guidelines and best management practices (BMPs) for municipal, commercial, and industrial activities. The permittees must exercise a combination of these programs, policies, and legal authority to minimize pollutant loads resulting from urbanization.

15. If not properly controlled and managed, urbanization could result in the discharge of pollutants into storm water runoff. Urban area runoff (Finding 9.c.) may contain elevated levels of pathogens (bacteria, protozoa, viruses), sediment, trash, fertilizers (nutrients, nitrogen and phosphorus compounds), pesticides (DDT, chlordane, diazinon, chlorpyrifos), heavy metals (cadmium, chromium, copper, lead, zinc), and petroleum products (oil, grease, petroleum hydrocarbons, polycyclic aromatic hydrocarbons). Storm water can carry these pollutants to rivers, streams, lakes, bays and the ocean (receiving waters).

16. These pollutants can then impact the beneficial uses of the receiving waters and can cause or threaten to cause a condition of pollution or nuisance. Pathogens (from sanitary sewer overflows, septic system leaks, spills and leaks from portable toilets, pets, wildlife, and human activities) can impact water contact recreation, non-contact water recreation and shellfish harvesting. On a nationwide basis, microbial contamination of the beaches from urban runoff and other sources has resulted in beach closures and health advisories. Floatables

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(from trash) are an aesthetic nuisance and can be a substrate for algae and insect vectors. Oil and grease can coat birds and aquatic organisms, adversely affecting respiration and/or thermoregulation. Other petroleum hydrocarbon components can cause toxicity to aquatic organisms and can impact human health. Suspended and settleable solids (from sediment, trash, and industrial activities) can be deleterious to benthic organisms and may cause anaerobic conditions to form. Sediments and other suspended particulates can cause turbidity, clog fish gills and interfere with respiration in aquatic fauna. They can also screen out light, hindering photosynthesis and normal aquatic plant growth and development. Toxic substances (from pesticides, herbicides, petroleum products, metals, and industrial wastes) can cause acute and/or chronic toxicity, and can bioaccumulate in aquatic resources (sediments and biota) to levels, which are harmful to human health. Nutrients (from fertilizers, confined animal facilities, pets, and birds) can cause excessive algal blooms. These blooms can lead to problems with taste, odor, color and increased turbidity, and can depress the dissolved oxygen content, leading to fish kills.

17. The water quality assessment conducted by Regional Board staff has identified a number of other beneficial use impairments from urban runoff. Section 303(b) of the CWA requires each of the regional boards to routinely monitor and assess the quality of waters of the region. If this assessment indicates that beneficial uses are not met, then that waterbody must be listed under Section 303(d) of the CWA as an impaired waterbody. The 1998 water quality assessment listed a number of water bodies within the Region under Section 303(d) as impaired waterbodies. In the San Bernardino County area, these include: (1) Big Bear Lake (listed for copper, mercury, metals, noxious aquatic plants, nutrients and sedimentation/siltation); (2) Summit Creek (listed for nutrients); (3) Knickerbocker Creek (listed for metals and pathogens); (4) Grout Creek (listed for metals and nutrients); (5) Rathbone Creek (listed for nutrients, sedimentation/siltation); (6) Mountain Home Creek (listed for pathogens); (7) Mill Creek, Reaches 1 and 2, (listed for pathogens); (8) Santa Ana River, Reach 4 (listed for pathogens); (9) Lytle Creek (listed for pathogens); (10) Chino Creek, Reaches 1 and 2 (listed for high coliform count); (11) Cucamonga Creek, Valley reach (listed for high coliform count); (12) Mill Creek (Prado Area) (listed for nutrients); and, (13) Prado Park Lake (listed for nutrients and pathogens). For some of these impaired waterbodies, the cause of impairment is listed as urban runoff.

18. Federal regulations require that a total maximum daily load (TMDL) be established for each 303(d) listed waterbody for each of the pollutants causing impairment. The TMDL is the total amount of the problem pollutant that can be discharged while water quality standards in the receiving water are attained, i.e. water quality objectives are met and the beneficial uses are protected. It is the sum of the individual wasteload allocations (WLA) for point source inputs, load allocations (LA) for non-point source inputs and natural background, with a margin of safety. The TMDLs are the basis for limitations established in waste

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discharge requirements. TMDLs are being developed for sediment, pathogens, and nutrients and other pollutants for impaired water bodies in San Bernardino County. Dischargers to these water bodies are currently cooperating in the development of these TMDLs.

19. The MS4s generally contain non-storm water flows such as irrigation runoff, residential car washes, runoff from miscellaneous washing and cleaning operations, and other nuisance flows. Discharges of non-storm water containing pollutants into the MS4 systems and to waters of the U.S. are prohibited unless they are regulated under separate NPDES permit; or are exempt as indicated in Discharge Prohibition, Section III, Item 3 of this Order.

20. Order No. 90-136 (first term permit) required the permittees to develop and implement a drainage area management plan (DAMP) and a storm water and receiving water monitoring plan, to eliminate illegal and illicit discharges to the MS4s and to enact the necessary legal authority to effectively prohibit such discharges. The overall goal of these requirements was to reduce pollutant loading to surface waters from urban runoff to the maximum extent practicable (MEP)[3]. Order No. 96-32 (second term permit) required continued implementation of the DAMP and the monitoring plan, and required the permittees to focus on those areas which threaten the beneficial uses.

21. This Order (Order No. R8-2002-0012, third term permit) outlines additional steps for an effective storm water management program and specifies requirements to protect the beneficial uses of all receiving waters. This Order requires the permittees to examine sources of pollutants in storm water runoff from activities that the permittees conduct, approve, regulate and/or authorize by issuing a license or permit.

22. The Report of Waste Discharge (ROWD) submitted for the third term permit included the following major elements:

    a. Summary of accomplishments and water quality monitoring results during the second term permit;

    b. Proposed Municipal Storm Water Management Program (MSWMP) for the third term. (The MSWMP, included in the ROWD for the third term permit, replaces the DAMP from the first term permit);

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[3] Maximum Extent Practicable (MEP) means the standard for implementation of storm water management to reduce pollutants in storm water. CWA section 402(p)(3)(B)(iii) requires that municipal permits "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. Specifically, municipalities must choose effective BMPs, and reject applicable BMPs only where other effective BMPs will serve the same purpose..

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c. Performance commitments for Proposed Program Elements;

d. Guidelines for New Development and Redevelopment; and

e. A revised Water Quality Monitoring Plan.

23. The permittees own and/or operate facilities where industrial or related activities take place that may have an impact on storm water quality. Some of the permittees also enter into contracts with outside parties to carry out municipal related activities that may also have an impact on storm water quality. These facilities and related activities include, but are not limited to, street sweeping, catch basin cleaning, maintenance yards, vehicle and equipment maintenance areas, waste transfer stations, corporation and storage yards, parks and recreational facilities, landscape and swimming pool maintenance activities, storm drain system maintenance activities and the application of herbicides, algaecides and pesticides. The permittees have prepared an environmental performance report for appropriate public facilities under their jurisdiction, and identified best management practices for those activities found to require pollution prevention measures. Non-storm water discharges from these facilities and/or activities could also affect water quality. This Order prohibits non-storm water discharges from public facilities unless the discharges are exempt under Section III, Discharge Limitations, 4 & 6 of this Order or are permitted by the Regional Board under an individual NPDES permit. The second term permit required the permittees to develop and implement a model Municipal Activities Pollution Prevention Strategy (MAPPS), including sewage spill response, maintenance practices at parks and recreation facilities, street sweeping and public agency employee training.

24. Successful implementation of the provisions and limitations in this Order will require the cooperation of other entities and all the public agency organizations within San Bernardino County (e.g., Fire Department, Building and Safety, Code Enforcement, Planning, etc.) having programs/activities that have an impact on storm water quality. Some of these organizations are not regulated under this Order. (A list of these organizations is included in Attachment 3.) As such, these organizations are expected to actively participate in implementing the San Bernardino County NPDES Storm Water Program. The permittees have developed inter-departmental training programs and have made commitments to conduct a certain number of these training programs during the term of this permit. If any entity such as those listed in Attachment 3 is determined to cause or contribute to violations of this Order, the Regional Board has the discretion and authority to require the non-cooperating entity to participate in this areawide permit or obtain individual storm water discharge permits, pursuant to 40 CFR 122.26(a). The permittees have developed an Implementation Agreement among the SBCFCD, the County and the cities. The Implementation Agreement establishes the responsibilities of each party and a funding mechanism for the shared costs, and recognizes the Management Committee.

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25. The major focus of storm water pollution prevention is the development and implementation of appropriate MSWMP including best management practices (BMPs). The ultimate goal of the urban storm water management program is to support attainment of water quality consistent with the water quality objectives for the receiving waters in order to protect beneficial uses through the implementation of the MSWMP.

26. The MSWMP is a dynamic document and the permittees have implemented, or are in the process of implementing, the various elements of the MSWMP. During the second permit term, the DAMP for the San Bernardino County areawide permit was replaced by the MSWMP contained in the ROWD submitted in 1995. This Order requires the permittees to continue to implement the BMPs listed in the ROWD (2000) and the MSMWP; update or modify the MSWMP, when appropriate, consistent with the MEP and other applicable standards; and to effectively prohibit illegal and illicit discharges to the storm drain system.

27. Urban runoff contains pollutants from privately owned and operated facilities such as residences, businesses, private and/or public institutions, and commercial establishments. Therefore, a successful storm water management plan should include the participation and cooperation of the public, businesses, the permittees and the regulators. The ROWD (2000) has a strong emphasis on public education.

28. The San Bernardino County ROWD (2000) defined: (1) a management structure to facilitate permittees' compliance efforts; (2) a formal agreement to underpin cooperation; and (3) detailed municipal efforts to develop, implement, and evaluate various BMPs or control programs in the areas of public agency activities, public information, new development and construction, public works construction, industrial discharger identification, and illicit discharger/connection identification and elimination. The ROWD (2000) also defined a surface water quality monitoring program.

29. In order to characterize storm water discharges, to identify problem areas, to determine the impact of urban runoff on receiving waters, and to determine the effectiveness of the various BMPs, an effective monitoring program is critical. The principal permittee administers the monitoring program for the permittees. This program includes storm drain outfall monitoring, receiving water monitoring, and dry weather monitoring. The monitoring data from the last decade identified elevated pollutant levels at monitoring stations 2, 3, and 5. Drainage at Station 2 is influenced by mixed commercial and industrial land uses. Station 3 is characterized by mixed land uses including agricultural. Station 5 is influenced by commercial and light industrial land uses. These areas could be targeted for special pollutant source identification and control programs. The monitoring data indicated some spatial differences in water quality between San Bernardino County's major watersheds.

30. The Strategic Plan and Initiatives (June 22, 1995) and the 2001 Draft Strategic

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Plan for the State Water Resources Control Board and the Regional Water Quality Control Boards recognize the importance of an integrated watershed management approach. The Regional Board also recognizes that a watershed management program should integrate all related programs, including the storm water programs and TMDL processes. Further, the State Board is required by SB 72 (Water Code Section 13383.5) to develop a statewide municipal storm water monitoring program. Consistent with this approach, some of the municipal storm water monitoring programs have already been integrated into regional monitoring programs. This Order requires the permittees to develop an integrated watershed monitoring program by July 1, 2003.

31. Illegal discharges[4] to the storm drains could contribute to storm water and other surface water contamination. A reconnaissance survey of the municipal storm drain systems (open channels and underground storm drains) was completed by the permittees. The permittees also developed a program to prohibit illicit connections to their storm drains and flood control facilities. Continued surveillance and enforcement of these programs are required to eliminate illicit connections and illegal discharges. The permittees have a number of mechanisms in place to eliminate illegal discharges to the MS4s, including industrial facility inspections, drainage facility inspections, water quality monitoring programs, and public education. The permittees also developed a summary format for illegal discharge reporting. During the second term permit, the permittees completed a reconnaissance survey of the MS4s to detect and eliminate any illicit connections (undocumented or unpermitted connections to the MS4s). The permittees have trained their staff on illegal discharge surveillance/cleanup procedures. The permittees will continue to monitor for any new illicit connections and will concentrate on preventing/cleanup of illegal discharges.

32. The permittees have the authority to control pollutants in storm water discharges, to prohibit illegal discharges/illicit connections, to control spills, and to require compliance and carry out inspections of the storm drain systems within their respective jurisdictions. The permittees have various forms of legal authority in place, such as charters, State Code provisions for General Law cities, the San Bernardino County Flood Control Ordinance, San Bernardino County Water Pollution Ordinance, various county ordinances which address industrial wastes and waste discharges within the unincorporated areas, city ordinances, and applicable portions of municipal codes and the State Water Code, to regulate storm water/urban runoff discharges.

33. In order to promote countywide consistency and to provide a legal underpinning

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[4] Illegal discharge means any discharge (or seepage) to the municipal separate storm sewer that is not composed entirely of storm water except for the authorized discharges listed in Section III of this permit. Illegal discharges include the improper disposal of wastes into the storm sewer system.

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to the entire San Bernardino County Storm Water Program, a model Storm Drain Ordinance was completed in the first permit term and was adopted by all the permittees. The permittees are required to evaluate the effectiveness of their existing enforcement authority to determine the need for enhancement of their legal authority to administer civil and/or criminal penalties for violations of Storm Drain Ordinance.

34. Pollution prevention techniques, appropriate planning processes, and early identification of potential storm water impacts and mitigation measures can significantly reduce storm water pollution problems. During the second permit term, the permittees have completed the review and made the necessary revisions to consider storm water quality impacts and appropriate mitigation measures in the planning procedures and in the California Environmental Quality Act (CEQA) review process for specific projects, Master Plans, etc. The County of San Bernardino already requires a Water Quality Management Plan, which addresses permanent post-construction BMPs, in addition to the SWPPP required by the statewide general permit for construction activity. The permittees are encouraged to propose and participate in watershed-wide and/or regional water quality management programs.

35. Successful implementation of the provisions and limitations in this Order will require the cooperation of all the public agency organizations within San Bernardino County having programs/activities that have an impact on storm water quality (e.g. Fire Department, Building and Safety, Code enforcement, etc.). As such, these organizations are expected to actively participate in implementing this areawide storm water program.

36. In accordance with the Clean Water Act and its implementing regulations, this Order requires the permittees to develop and implement programs and policies necessary to minimize the discharge of pollutants in urban runoff to waters of the U. S. to the maximum extent practicable.

37. The legislative history and the preamble to the federal storm water regulations indicate that the Congress and the U.S. EPA were aware of the difficulties in regulating urban storm water runoff solely through traditional end-of-pipe treatment. However, it is the Regional Board's intent that this Order requires the implementation of best management practices to reduce to the maximum extent practicable the discharge of pollutants in storm water from the MS4s in order to support attainment of water quality standards. This Order, therefore, includes Receiving Water Limitations based on water quality objectives, prohibits the creation of nuisance and requires the reduction of water quality impairment in receiving waters. In accordance with Section 402 (p) of the Clean Water Act, this Order requires the permittees to implement control measures in accordance with the ROWD, that will reduce pollutants in storm water discharges to the maximum extent practicable. The Receiving Water Limitations similarly require the implementation of control measures to protect beneficial uses and attain water quality objectives of the receiving waters.

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38. The Regional Board finds that the unique aspects of the regulation of storm water discharges through municipal storm sewer systems, including intermittent discharges, difficulties in monitoring and limited physical control over the discharge, will require adequate time to implement and evaluate the effectiveness of best management practices. Therefore, the permit includes a procedure for determining whether storm water discharges are causing or contributing to exceedances of receiving water limitations and for evaluating whether the MSWMP contained in the ROWD must be revised in order to comply with this aspect of the Order. The Order establishes an iterative process to determine compliance with the receiving water limitations.

39. The permittees are required to conduct inspections of construction sites, industrial facilities and commercial establishments. To avoid duplicative efforts, the permittees need not inspect facilities that have been inspected by Regional Board staff if the inspection was conducted during the specified time period. Regional Board staff inspection data will be posted regularly on its Internet site. It is anticipated that many of the inspections required under this Order can and will be carried out by inspectors currently conducting inspections for the permittees (i.e., grading, building, code enforcement, etc.), during their normal duties.

40. A revised Water Quality Control Plan (Basin Plan) was adopted by the Regional Board and became effective on January 24, 1995. The Basin Plan contains water quality objectives and beneficial uses for water bodies in the Santa Ana Region. The Basin Plan also incorporates by reference all State Board water quality control plans and policies including the 1990 Water Quality Control Plan for Ocean Waters of California (Ocean Plan) and the 1974 Water Quality Control Policy for Enclosed Bays and Estuaries of California (Enclosed Bays and Estuaries Plan).

41. The requirements contained in this Order are necessary to implement the plans and policies described in Finding 48, below. These plans and policies contain numeric and narrative water quality standards for the water bodies in this Region. This Order does not contain numeric effluent limitations for any constituents because the impact of the storm water discharges on the water quality of the receiving waters has not yet been fully determined. Continuation of water quality/biota monitoring and analysis of the data are essential to make that determination. The current Basin Plan, or any further changes to the Basin Plan, may be grounds for the permittees to revise some or all of its ROWD.

42. The permittees will be required to comply with any applicable future water quality standards or discharge requirements that may be imposed by the EPA or State of California prior to the expiration of this Order. This Order may be reopened to include TMDLs and/or other requirements developed and adopted by the Regional Board.

43. The permittees may petition the Regional Board to issue a separate NPDES permit to any discharger of non-storm water into storm drain systems that they

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own or operate.

44. The permittees have developed a Storm Water Implementation Agreement between the County, its cities and the San Bernardino County Flood Control District. The Implementation Agreement established the responsibilities of each party and a funding mechanism for the shared costs and recognizes the establishment of a Management Committee for overall guidance and as a decision making body.

45. It is important to control litter and eliminate trash and other materials in stormwater runoff. In addition to the municipal ordinances prohibiting litter, the permittees also organize solid waste collection programs, household hazardous waste collections, and recycling programs to reduce litter and illegal discharges.

46. Reach 4 of the Santa Ana River which extends from Mission Boulevard in Riverside to the San Jacinto Fault in San Bernardino is an impaired water body listed on the 303(d) list for pathogens from non-point sources. These elevated levels may in part be attributed to discharges from the MS4 systems. This Order requires the permittees to investigate and characterize MS4 discharges to tributaries to the Santa Ana River, Reach 4, for potential bacterial contribution.

47. Public education is an important part of storm water pollution prevention. The permittees have employed a variety of means to educate the public, business and commercial establishments, industrial facilities and construction sites. The permittees are required to continue their efforts in public education programs.

48. The permittees established a subcommittee consisting of a number of permittees, the Building Industry Association, the development industry, the California Restaurant Association, and the Western States Petroleum Association and developed the "Guidelines for New Development and Redevelopment." The guidance document includes a list of routine structural and non-structural Best Management Practices for new developments. The permittees are implementing the BMPs from this guidance document and are requiring new developments and significant redevelopments to develop and implement appropriate Water Quality Management Plans (WQMP). This Order requires additional structural and non-structural BMPs for new developments and significant redevelopments only if an equivalent regional and/or watershed-wide management program is not being implemented.

49. The Regional Board and the permittees recognize the importance of watershed management initiatives and regional planning and coordination in the development and implementation of programs and policies related to water quality protection. A number of such efforts are underway where the permittees are active participants. This Order encourages continued participation in such programs and policies. The Regional Board also recognizes that in certain cases, diversion of funds targeted for certain monitoring programs to regional monitoring programs may be necessary. The Executive Officer is authorized to approve, after proper public notification and consideration of all comments

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received, the watershed management initiatives, regional planning and coordination programs and regional monitoring programs.

50. The storm water regulations require public participation in the storm water management program development and implementation. As such the permittees are required to solicit and consider all comments received from the public and submit copies of the comments to the Executive Officer of the Regional Board. In response to public comments, the permittees may modify reports, plans, or schedules prior to submittal to the Executive Officer.

51. In accordance with California Water Code Section 13389, the issuance of waste discharge requirements for this discharge is exempt from those provisions of the California Environmental Quality Act contained in Chapter 3 (commencing with Section 21100), Division 13 of the Public Resources Code.

52. The Regional Board has considered anti-degradation requirements, pursuant to 40 CFR 131.12 and State Board Resolution 68-16, for the permitted discharges. This Order requires implementation of programs (i.e., BMPs) to reduce the level of pollutants in the storm water discharges. The combination of programs and policies required to be implemented under this Order for new and existing developments are designed to improve storm water quality. The Regional Board finds that the storm water discharges are consistent with the federal and state anti-degradation requirements and a complete anti-degradation analysis is not necessary.

53. The Regional Board has notified the permittees and interested parties of its intent to issue waste discharge requirements for this discharge and has provided them with an opportunity to submit their written views and recommendations.

54. The Regional Board, in a public hearing, heard and considered all comments pertaining to the discharge and to the tentative requirements.

IT IS HEREBY ORDERED that the permittees, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Clean Water Act, as amended, and the regulations and guidelines adopted thereunder, shall comply with the following:

I. RESPONSIBILITIES OF THE PRINCIPAL PERMITTEE:

The principal permittee shall be responsible for managing the overall storm water program and shall:

1. Conduct chemical, biological and bacteriological water quality monitoring as required by the Executive Officer of the Regional Board.

2. Implement management programs, monitoring programs, and related plans as required by this Order.

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3. Prepare and submit to the Executive Officer of the Regional Board, unified reports, plans, and programs necessary to comply with this Order.
4. Coordinate and conduct Management Committee meetings as specified in the ROWD. The principal permittee will take the lead role in initiating and developing area-wide programs and activities necessary to comply with the NPDES Permit.
5. Coordinate permit activities and participate in any subcommittees formed as necessary, to coordinate compliance activities with this Order.
6. Provide technical and administrative support and inform the co-permittees of the progress of other pertinent municipal programs, pilot projects, research studies, and other information to facilitate implementation of co-permittees' storm water program.
7. Coordinate the implementation of area-wide storm water quality management activities such as monitoring program, public education, pollution prevention, etc.
8. Gather and disseminate information on the progress of statewide municipal storm water programs and evaluate the information for potential use in the execution of this Order.
9. Monitor the implementation of the plans and programs required by this Order and determine their effectiveness in attaining water quality standards. This determination shall include a comparative analysis of monitoring data to the USEPA Multi-Sector Permit Parameter Benchmark Values and applicable water quality objectives for inland surface streams. A pollutant source investigation and control plan shall be developed and implemented where elevated pollutant levels are identified. This plan shall be included in the annual report submitted to the Executive Officer.
10. Coordinate with the Regional Board activities pertaining to implementation of this Order, including the submittal of all reports, plans, and programs as required under this Order.
11. Solicit and coordinate public input for any major proposed storm water management programs and implementation plans.
12. Develop and implement mechanisms, performance standards, etc., to promote consistent implementation of BMPs among the permittees.
13. Cooperate in watershed management programs and regional and/or statewide monitoring programs.

In addition, the activities of the principal permittee shall, at a minimum, include the following for MS4 systems owned and operated by the SBCFCD:

14. Pursue enforcement actions as necessary within its jurisdiction to ensure compliance with storm water management programs, ordinances and implementation plans, including removal via enforcement authority of undocumented connections and prohibition of illegal discharges.

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15. Conduct inspections and maintain the storm drain systems within its jurisdiction.

16. Review and revise, if necessary, policies and ordinances necessary to establish and maintain adequate legal authority, as required by the Federal Storm Water Regulations.

17. Respond to or arrange for responding to emergency situations such as accidental spills, leaks, illicit connections/illegal discharges, etc., to prevent or to reduce the discharges of pollutants to storm drain systems and waters of the U.S.

18. Take appropriate enforcement actions for illegal discharges to the MS4 systems within its jurisdiction.

19. In conjunction with the other permittees, implement the BMPs listed in the ROWD, and take such other actions as may be necessary to meet the MEP standard.

II. RESPONSIBILITIES OF THE CO-PERMITTEES

The co-permittees shall be responsible for managing the storm water program within their jurisdiction and shall:

1. Implement all program elements including but not limited to the management programs, monitoring programs, implementation plans and all BMPs outlined in the ROWD within each respective jurisdiction, and take such other actions as may be necessary to meet the MEP standard.

2. Enact and revise policies and ordinances necessary to establish and maintain adequate legal authority as stated in Section VI.1 of this Order and as required by the Federal Storm Water Regulations, 40CFR, Part 122.26(d)(2)(i)(A-F). By March 1, 2003, the permittees shall evaluate their ordinances to determine if they are authorized to impose administrative fines for storm water violations. Government Code Section 53069.4 authorizes cities to make violations of any ordinance subject to an administrative fine or penalty instead of criminal prosecution. If necessary, the permittees shall adopt ordinances to set a penalty structure and to authorize them to impose and collect fines administratively by March 1, 2004.

3. Conduct storm drain system inspections and maintenance in accordance with the uniform criteria developed by a subcommittee of the permittees.

4. Take appropriate enforcement actions for violations of the storm water regulations and ordinances for illegal discharges into the MS4 systems within the co-permitees' jurisdiction.

5. Prepare and submit to the principal permittee in a timely manner all required information necessary to develop a unified report for submittal to the Executive Officer of the Regional Board.

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6. Designate at least one representative to the Management Committee and attend at least 9 out of the 11 Management Committee meetings per year. The principal permittee shall be notified immediately, in writing of any changes to the designated representative to the Management Committee.

7. Conduct and/or coordinate with the principal permittee any surveys and characterizations needed to identify pollutant sources from specific drainage areas.

8. Review and comment on all plans, strategies, management programs, monitoring programs, as developed by the principal permittee or any subcommittee to comply with this Order.

9. Participate in committees or subcommittees formed to address storm water related issues to comply with this Order.

10. Respond to or arrange for responding to emergency situations such as accidental spills, leaks, illegal discharges/illicit connections, etc. to prevent or reduce the discharge of pollutants to storm drain systems and waters of the U.S.

11. Pursue enforcement actions as necessary within its jurisdiction for violations of storm water ordinances, prohibitions on illicit connections and illegal discharges, and other elements of its storm water management program.

III. DISCHARGE LIMITATIONS/PROHIBITIONS

1. In accordance with the requirements of 40 CFR 122.26(d)(2)(I)B) and 40 CFR 122.26(d)(2)(I)(F), the permittees shall prohibit illicit connections and illegal discharges (non-storm water) from entering municipal separate storm sewer systems.

2. The discharge of storm water from permittees' municipal separate storm sewer systems to waters of the United States containing pollutants that have not been reduced to the maximum extent practicable is prohibited.

3. The permittees shall effectively prohibit the discharge of non-storm water into the MS4s unless such discharges are authorized by either a separate NPDES permit or as otherwise specified in this provision. The discharges identified below need not be prohibited by the permittees. If, however, any of these discharges are identified by the permittees or the Executive Officer as a significant source of pollutants, coverage under the Regional Board's De Minimis permit may be required.

   a. Discharges covered by NPDES permits or written clearances issued by the Regional or State Board,

   b. Potable water line flushing and other potable water sources,

   c. Air conditioning condensate,

   d. Landscape irrigation, lawn garden watering and other irrigation waters,

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e. Passive foundation drains,

f. Passive footing drains,

g. Water from crawl space pumps,

h. Dechlorinated swimming pool discharges,

i. Non-commercial vehicle washing,

j. Diverted stream flows,

k. Rising ground waters and natural springs,

l. Ground water infiltration as defined in 40 CFR 35.2005 (20) and uncontaminated pumped groundwater,

m. Flows from riparian habitats and wetlands,

n. Emergency fire fighting flows (i.e., flows necessary for the protection of life and property) do not require BMPs and need not be prohibited. However, appropriate BMPs shall be considered where practicable when not interfering with health and safety issues (see also Section XIV Provision 3);

o. Waters not otherwise containing wastes as defined in California Water Code Section 13050 (d), and

p. Other types of discharges identified and recommended by the permittees and approved by the Regional Board.

The Regional Board may issue Waste Discharge Requirements for discharges exempted from NPDES requirements, such as agricultural irrigation waters, if identified to be a significant source of pollutants. The Regional Board may add categories of non-storm water discharges that are not significant sources of pollutants or remove categories of non-storm water discharges listed above based upon a finding that the discharges are a significant source of pollutants.

4. For purposes of this Order, a discharge may include storm water or other types of discharges identified in item 3, above.

5. Non-storm water discharges from permittees' activities into waters of the U.S. are prohibited unless the non-storm water discharges are permitted by an NPDES permit or are included in Item 3, above.

6. The permittees shall reduce the discharge of pollutants, including trash and debris, from the storm water conveyance systems to the maximum extent practicable.

7. Discharges from the MS4s shall be in compliance with the discharge prohibitions contained in Chapter 5 of the Basin Plan.

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8. Discharges from the MS4s of storm water, or non-storm water, for which a permittee is responsible, shall not cause or contribute to a condition of nuisance as that term is defined in Section 13050 of the Water Code.

IV. RECEIVING WATER LIMITATIONS

1. Discharges from the MS4s shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives) contained in the Basin Plan, and amendments thereto, for surface or groundwater.

2. The MSWMP and its components shall be designed to achieve compliance with receiving water limitations. It is expected that compliance with receiving water limitations will be achieved through an iterative process and the application of increasingly more effective BMPs. The permittees shall comply with Sections III.2 and IV of this Order through timely implementation of control measures and other actions to reduce pollutants in urban storm water runoff in accordance with the MSWMP and its components and other requirements of this Order, including any modifications thereto.

3. If exceedances of water quality objectives or water quality standards (collectively, WQS) persist, notwithstanding implementation of the MSWMP and other requirements of this Order, the permittees shall assure compliance with Sections III.2 and IV of this Order by complying with the following procedure:

   a. Upon a determination by either the permittees or the Executive Officer that the discharges from the MS4 systems are causing or contributing to an exceedance of an applicable water quality standard, the permittees shall promptly notify and thereafter submit a report to the Executive Officer that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. Determination of the effect of discharges from the MS4 systems on water quality standards shall include a comparative analysis of monitoring data to the USEPA Multi-Sector Permit Parameter Benchmark Values and applicable water quality objectives for inland surface streams as specified in Chapter 4 of the Basin Plan. A pollutant source investigation and control plan shall be developed and implemented where elevated pollutant levels are identified. The report shall address the causes of the impairment or exceedance, and the technical and economic feasibility of control actions available to the permittees to reduce or eliminate the impairment or exceedance. The report may be incorporated in the annual report unless the Executive Officer directs an earlier submittal. The report shall include an implementation schedule. The Executive Officer may require modifications to the report;

   b. Submit any modifications to the report required by the Executive Officer

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within 30 days of notification;

c. Within 30 days following approval of the report described above by the Executive Officer, the permittees shall revise the storm water management programs and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;

d. Implement the revised storm water management programs and monitoring program in accordance with the approved schedule.

So long as the permittees have complied with the procedures set forth above and are implementing the revised storm water management programs, the permittees do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless the Executive Officer determines it is necessary to develop additional BMPs.

V. IMPLEMENTATION AGREEMENT

No later than July 1 of each year, the permittees shall evaluate the storm water management structure and the Implementation Agreement and determine the need for any revision. The annual report shall include the findings of this review and a schedule for any needed revisions.

VI. LEGAL AUTHORITY/ENFORCEMENT

1. The permittees shall maintain and enforce adequate legal authority to control contribution of pollutants to the MS4.

2. The permittees shall take appropriate enforcement actions against any violators of their codes and/or ordinances in accordance with the formalized enforcement procedures developed by the Management Committee.

3. Permittees' ordinances or other local regulatory mechanisms shall include sanctions for violations. Sanctions shall include but are not limited to: monetary penalties, non-monetary penalties, bonding requirements, and/or permit denials/revocations/stays for non-compliance. If the permittees' current ordinances do not have a provision for civil or criminal penalties for violations of their storm drain ordinances, the permittees shall enact such ordinances by March 1, 2004.

4. The permittees shall continue to provide notification to Regional Board staff regarding storm water related information gathered during site inspections of industrial and construction sites regulated by the Statewide General Storm Water Permits or sites which should be regulated under the State's General Permits. The notification should include any observed violations of the General Permits, prior history of violations, any enforcement actions taken by the permittee, and any other relevant information.

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5. By November 15, 2003, the permittees shall review their storm drain ordinances and provide a report on the effectiveness of their ordinances and their enforcement, in prohibiting the following types of discharges to the MS4s (the permittees may propose appropriate control measures in lieu of prohibiting these discharges, where the permittees are responsible for ensuring that dischargers adequately maintain these control measures:

   a. Sewage, where a permittee operates the sewage collection system;

   b. Wash water resulting from the hosing or cleaning of gas stations, and other type of automobile service stations;

   c. Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility including motor vehicles, concrete mixing equipment, and portable toilet servicing;

   d. Wash water from mobile auto detailing and washing, steam and pressure cleaning, carpet cleaning, and other such mobile commercial and industrial operations;

   e. Water from cleaning of municipal, industrial, commercial, residential areas (including parking lots), streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas containing chemicals or detergents and without prior sweeping;

   f. Runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials,

   g. Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; pool filter backwash containing debris and chlorine;

   h. Pet waste, yard waste, debris, sediment, and other wastes or materials that have potential adverse impacts on the water quality;

   i. Restaurant wastes such as grease, floor mat and trash bin wash water, food waste, and other food service wastes.

6. The principal permittee or subcommittee shall, on or before March 1, 2003, develop a restaurant inspection program which shall, at a minimum, address:

   a. Oil and grease disposal to verify that these wastes are not poured onto a parking lot, street or adjacent catch basin;

   b. Trash bin areas to verify that these areas are clean, the bin lids are closed, the bins are not filled with liquid, and the bins have not been washed out;

   c. Parking lot, alley, sidewalk and street areas to verify that floor mats, filters and garbage containers are not washed in those areas and that no washwater is discharged in those areas;

   d. Parking lot areas to verify that they are cleaned by sweeping, not by hosing down and that the facility operator uses dry methods for spill cleanup; and,

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e. Inspection of existing devices designed to separate grease from wastewater (e.g., grease traps or interceptors) to ensure adequate capacity and proper maintenance.

7. By March 1, 2004, each permittee shall submit a statement (signed by its legal counsel) that the permittee has obtained all necessary legal authority to comply with this Order through adoption of ordinances and/or municipal code modifications.

VII. ILLEGAL DISCHARGE/ILLICIT CONNECTIONS; LITTER, DEBRIS AND TRASH CONTROL

1. The permittees shall continue to prohibit all illicit connections and illegal discharges to the MS4s through their ordinances, inspections, and monitoring programs. If routine inspections or dry weather monitoring indicate any illicit connections, they shall be investigated and eliminated or permitted within 60 days of discovery and identification. The permittees shall maintain a database that identifies both permitted and status of unpermitted connections resulting from routine inspections and dry weather monitoring. This information shall be updated on an ongoing basis and submitted annually beginning with the 2002-2003 annual report.

2. All reports of spills, leaks, and/or illegal dumping shall be promptly investigated. Those incidents that may pose an immediate threat to human health or the environment (e.g., sewage spills that could impact water contact recreation, an oil spill that could impact wild life, a hazardous substance spill where residents are evacuated, etc.) shall be reported to the Executive Officer within 24 hours by phone or e-mail, with a written report within 10 days. At a minimum, all sewage spills above 1,000 gallons and all reportable quantities of hazardous substance spills as per 40 CFR 117 and 302 shall be reported within 24 hours and all other spill incidents shall be included in the annual report. The permittees may propose a reporting program, including reportable incidents and quantities, jointly with other agencies such as the County Health/Fire Department for approval by the Executive Officer.

3. The permittees shall implement appropriate control measures to reduce and/or to eliminate the discharge of trash and debris to waters of the U.S. These control measures shall be reported in the annual report.

4. By July 1, 2003, the permittees shall review their litter/trash control ordinances to determine the need for any revision. The permittees are required to characterize trash, determine its main source(s), and develop and implement appropriate BMPs to control trash in urban runoff. The findings of this review, along with supporting field data shall be included in the 2002-2003 annual report.

5. By July 1, 2003, the permittees shall determine the need for any additional debris control measures. The findings shall be included in the 2002-2003 annual report.

VIII. MUNICIPAL INSPECTIONS OF CONSTRUCTION SITES

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1. The permittees shall develop by January 31, 2003, an inventory of all construction sites within their jurisdiction for which building or grading permits are issued and activities at the site include: soil movement; uncovered storage of materials or wastes, such as dirt, sand, or fertilizer; or exterior mixing of cementaceous products, such as concrete, mortar, or stucco, regardless of whether the construction site is subject to the California Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities (General Permit), or other individual NPDES permit. This database shall be updated prior to each rainy season thereafter. This inventory shall be maintained in a computer-based database system and shall include relevant information on site ownership, General Permit Waste Discharge Identification (WDID) # (if any), size, location, etc. Inclusion of a Geographical Information System (GIS) is recommended but not required.

2. To establish priorities for inspection requirements under this Order, the permittees shall prioritize construction sites within their jurisdiction as a high, medium, or low threat to water quality. Evaluation of construction sites should be based on such factors as soil erosion potential, project size, proximity and sensitivity of receiving waters and any other relevant factors. At a minimum, high priority construction sites shall include: sites over 50 acres; sites over 5 acres that are tributary to Clean Water Act section 303(d) waters listed for sediment or turbidity impairments; and sites that are tributary to and within 500 feet of an area defined by the Ocean Plan as an Area of Biological Significance (ASBS).

3. The permittees shall conduct construction site inspections for compliance with their ordinances (grading, Water Quality Management Plans, etc.), local permits (construction, grading, etc.). Inspections shall include a review of erosion control and BMP implementation plans and an evaluation of the effectiveness and maintenance of the BMPs identified. Inspection frequency will, at a minimum, include the following:

   a. During the wet season (i.e., October 1 through May 31 of each year), all high priority sites are to be inspected, in their entirety, once a month. All medium priority sites are to be inspected at least twice during the wet season. All low priority sites are to be inspected at least once during the wet season. When BMPs or BMP maintenance is deemed inadequate or out of compliance, an inspection frequency of once every week will be maintained until BMPs and BMP maintenance are brought into compliance. During the 2002-2003 wet season, prior to the development of the inventory database, all construction sites must be visited at least twice. If a site is deemed out of compliance, an inspection frequency adequate to bring the site into compliance must be maintained.

   b. During the dry season (i.e., June 1 through September 30 of each year), all construction sites shall be inspected at least once to determine the adequacy of sediment and other pollutant control measures.

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c. Information, including at a minimum, inspection dates, inspectors present and the results of the inspection must be maintained in the database identified in Section VIII.1, above, or must be linked to that database. A copy of this database must be provided to the Regional Board with each annual report.

4. The permittees shall enforce their ordinances and permits at all construction sites as necessary to maintain compliance with this Order. Sanctions for non-compliance must include: monetary penalties, bonding requirements and/or permit denial or revocation.

5. Within 24 hours of discovery, the permittees shall provide oral or email notification to the Santa Ana Regional Water Quality Control Board of non-compliant sites, within their jurisdiction, that are determined to pose a threat to human health or the environment (e.g., sewage spills that could impact water contact recreation, an oil spill that could impact wild life, a hazardous substance spill where residents are evacuated, etc.). Following oral notification, a written report must be submitted to the Santa Ana Regional Water Quality Control Board within 10 days, detailing the nature of the non-compliance, any corrective action taken by the site owner, other relevant information (e.g., past history of non-compliance, environmental damage resulting from the non-compliance, site owner responsiveness) and the type of enforcement that will be carried out by the permittee. Further, incidences of non-compliance shall be recorded along with the information noted in the written report and the final outcome/enforcement for the incident in the database identified in Items 1 and 3c, above, or must be linked to these databases.

6. The inspectors responsible for verifying compliance at construction sites shall be trained in and have an understanding of: federal, state and local water quality laws and regulations as they apply to construction and grading activities; the potential effects of construction and urbanization on water quality; and, implementation and maintenance of erosion control BMPs and sediment control BMPs and the applicable use of both. The permittees shall have adequately trained their inspection staff by December 31, 2002, and on an annual basis, prior to the rainy season, thereafter. Training programs should be coordinated with the Santa Ana Regional Water Quality Control Board and prior notification of training shall be provided to Regional Board staff. New hires or transfers that will be performing construction inspections for the permittees must be trained within one month of starting inspection duties.

7. The permittees need not inspect facilities already inspected by Regional Board staff if the inspection was conducted within the specified time period.

IX. MUNICIPAL INSPECTIONS OF INDUSTRIAL FACILITIES

1. The permittees shall develop by July 1, 2003, an inventory of industrial facilities within their jurisdiction with business permits or other authorization by permittees that have the potential to discharge pollutants to the MS4. Facilities will be listed,

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regardless of whether the facility is subject to the California Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (General Industrial Permit), or other individual NPDES permit. This database must be updated on an annual basis. This inventory must be maintained in a computer-based database system and must include relevant information on ownership, Standard Industrial Classification (SIC) code(s), General Industrial Permit WDID # (if any), size, location, etc. Inclusion of a Geographical Information System (GIS) is recommended but not required.

2. To establish priorities for inspection requirements under this Order, the permittees shall prioritize industrial facilities within their jurisdiction as a high, medium, or low threat to water quality. Evaluation of these facilities should be based on such factors as type of industrial activities (SIC codes), materials or wastes used or stored outside, pollutant discharge potential, facility size, proximity and sensitivity of receiving waters and any other relevant factors. At a minimum, a high priority shall be assigned to: facilities subject to section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA); and facilities with a high potential for or history of unauthorized, non-storm water discharges.

3. The permittees shall conduct industrial facility inspections for compliance with its ordinances and permits. Inspections shall include a review of material and waste handling and storage practices, pollutant control BMP implementation and maintenance and evidence of past or present unauthorized, non-storm water discharges. All high priority facilities identified in Section IX.2 shall be inspected and a report on these inspections shall be submitted by November 15, 2003 and a report of inspections during subsequent years shall be included in the annual report for that year.

4. After July 1, 2003, all high priority sites are to be inspected at least once a year; all medium priority sites are to be inspected at least once every two years; and all low priority sites are to be inspected at least once per permit cycle. In the event that inappropriate material or waste handling or storage practices are observed, or there is evidence of past or present unauthorized, non-storm water discharges, an inspection frequency adequate to bring the site into compliance must be maintained (at a minimum, once a month or within the compliance schedule prescribed by the permittee in a written notice to the discharger). Once compliance is achieved, a minimum inspection frequency of once every four months will be maintained for the next calendar year.

5. By September 1, 2005, the permittees shall identify the remaining industrial facilities that do not have business permits or other authorization by the permittees. These facilities shall be added to the database identified in Section IX.1 and shall be prioritized in accordance with the specifications identified in Section IX.2.

6. Information including, at a minimum, inspection dates, inspectors present and the results of the inspection must be maintained in the database identified in Section

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IX.1, above, or must be linked to that database. A copy of this database must be provided to the Regional Board with each annual report.

7. The permittees shall enforce their ordinances and permits at all industrial facilities as necessary to maintain compliance with this Order. Sanctions for non-compliance must include: monetary penalties, bonding requirements and/or permit denial or revocation.

8. Within 24 hours of discovery, the permittees shall provide oral or email notification to the Santa Ana Regional Water Quality Control Board of non-compliant facilities, within their jurisdiction, that are determined to pose a threat to human health or the environment; (e.g., sewage spills that could impact water contact recreation, an oil spill that could impact wild life, a hazardous substance spill where residents are evacuated, etc.). Following oral notification, a written report must be submitted to the Santa Ana Regional Water Quality Control Board within 10 days, detailing the nature of the non-compliance, any corrective action taken by the site owner, other relevant information (e.g., past history of non-compliance, environmental damage resulting from the non-compliance, facility owner responsiveness) and the type of enforcement that will be carried out by the permittee. Further, incidences of non-compliance shall be recorded along with the information noted in the written report and the final outcome/enforcement for the incident in the database identified in Section IX.1.

9. The inspectors responsible for verifying compliance at industrial and commercial facilities shall be trained in and have an understanding of: federal, state and local water quality laws and regulations as they apply to industrial activities; the potential effects of industrial discharge and urbanization on water quality; and implementation and maintenance of pollutant control BMPs. The permittees shall have adequately trained their inspection staff by July 1, 2003, and on an annual basis thereafter. Training programs should be coordinated with the Santa Ana Regional Water Quality Control Board and prior notification of training shall be provided to Regional Board staff. New hires or transfers that will be performing industrial and commercial inspections for the permittees must be trained within one month of starting inspection duties.

10. The permittees need not inspect facilities already inspected by Regional Board staff if the inspection was conducted within the specified time period.

X. MUNICIPAL INSPECTIONS OF COMMERCIAL FACILITIES

1. The permittees shall develop by July 1, 2003, an inventory of the following commercial facilities/companies listed below within their jurisdiction. This database must be updated on an annual basis. This inventory must be maintained in a computer-based database system and must include relevant information on ownership, size, location, etc. Inclusion of a Geographical Information System (GIS) is recommended but not required.

   a. Automobile mechanical repair, maintenance, fueling, or cleaning;

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b. Automobile and other vehicle body repair or painting;

c. Mobile automobile or other vehicle washing;

d. Mobile carpet, drape or furniture cleaning;

e. Mobile high pressure or steam cleaning;

f. Painting and coating;

g. Nurseries and greenhouses;

h. Landscape and hardscape installation;

i. Pool, lake and fountain cleaning;

j. Other commercial sites/sources that the permittees determine may contribute a significant pollutant load to their MS4.

2. To establish priorities for inspection requirements under this Order, the permittees shall prioritize commercial facilities/companies within their jurisdiction as a high, medium, or low threat to water quality based on such factors as the type, magnitude, and location of the commercial activity, potential for discharge of pollutants to the MS4, and any history of unauthorized non-storm water discharges.

3. The permittees shall conduct commercial facility inspections for compliance with its ordinances and permits. Inspections shall include a review of material and waste handling and storage practices, pollutant control BMP implementation and maintenance, and evidence of past or present unauthorized, non-storm water discharges.

4. After July 1, 2003, the permittees shall establish inspection frequencies and priorities as determined by the threat to water quality prioritization described in X.2. In the event that inappropriate material or waste handling or storage practices are observed, or there is evidence of past or present unauthorized, non-storm water discharges, an inspection frequency adequate to bring the site into compliance must be maintained.

5. By July 1, 2004, all high priority sites shall have been inspected at least once.

6. Information including at a minimum, inspection dates, inspectors present and the results of the inspection must be maintained in the database identified in Section X.1, above, or must be linked to that database. A copy of this database must be provided to the Regional Board with each annual report.

7. The permittees shall enforce their ordinances and permits at commercial facilities. Sanctions for non-compliance must include: monetary penalties, bonding requirements and/or permit denial or revocation.

8. Within 24 hours of discovery, the permittees shall provide oral or email notification to the Santa Ana Regional Water Quality Control Board of non-compliant facilities, within their jurisdiction, that are determined to pose a threat

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to human health or the environment; (e.g., sewage spills that could impact water contact recreation, an oil spill that could impact wild life, a hazardous substance spill where residents are evacuated, etc.). Following oral notification, a written report must be submitted to the Santa Ana Regional Water Quality Control Board within 10 days. All written reports shall detail the nature of the non-compliance, identify any corrective action taken by the site owner, and note other relevant information (e.g., past history of non-compliance, environmental damage resulting from the non-compliance, facility owner responsiveness) and the type of enforcement that will be carried out by the permittees. Further, incidences of non-compliance shall be recorded along with the information noted in the written report and the final outcome/enforcement for the incident in the database identified in Section X.1

9. The inspectors responsible for ensuring compliance at commercial facilities shall be trained in and have an understanding of: federal, state and local water quality laws and regulations as they apply to industrial and commercial activities; the potential effects of industrial discharge and urbanization on water quality; and, implementation and maintenance of pollutant control BMPs. The permittees shall have adequately trained their inspection staff by July 1, 2003 and on an annual basis thereafter. Training programs should be coordinated with the Santa Ana Regional Water Quality Control Board and prior notification of training shall be provided to Regional Board staff. New hires or transfers that will be performing commercial inspections for the permittees must be trained within one month of starting inspection duties.

XI. SEWAGE SPILLS, INFILTRATION INTO MS4 SYSTEMS FROM LEAKING SANITARY SEWER LINES, SEPTIC SYSTEM FAILURES, AND PORTABLE TOILET DISCHARGES

1. The Executive Officer will request the local sewering agencies to take the lead and develop a unified response guidance, in cooperation with the Principal Permittee. The Principal Permittee shall collaborate with the local sewering agencies to develop a unified response mechanism to respond to sewage spills that may have an impact on receiving water quality. The permittees shall provide local sanitation districts 24-hour access to the MS4s to address sewage spills. The permittees shall work cooperatively with the local sewering agencies to determine and control the impact of infiltration from leaking sanitary sewer systems on storm water quality.

2. By July 1, 2003, the permittees, whose jurisdictions have 50 or more septic tank sub-surface disposal systems in use, shall identify with the appropriate governing agency a mechanism to determine the effect of septic system failures on storm water quality and a mechanism to address such failures.

3. The principal permittee shall collaborate with the local sewering agencies to develop a unified response mechanism to respond to any sewage spills that may have an impact on receiving water quality. The Executive Officer will request the

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local sewering agencies to take the lead and develop the unified response guidance, by no later than July 1, 2003, in cooperation with the principal permittee.

4. By July 1, 2003, the principal permittee shall review the permittees' current oversight programs for portable toilets to determine the need for any revision.

XII. NEW DEVELOPMENT (INCLUDING SIGNIFICANT RE-DEVELOPMENT)

A. GENERAL REQUIREMENTS

1. By October 15, 2002, the permittees shall establish a mechanism to ensure (prior to issuance of any local permits or other approvals) that all construction projects and industrial facilities that are required to obtain coverage under the State's General Storm Water Permits have filed with the State Board a Notice of Intent to be covered by the relevant General Permit. Applicants shall be required to provide a copy of the Waste Discharger Identification Number (WDID) issued by the State Board as evidence of coverage under the General Permit.

2. By September 1, 2002, the permittees shall review and modify the approval process for building, grading, and similar permits to include incorporation of BMPs as provided in the Guidelines for New Development and Redevelopment.

3. The permittees shall review and revise the storm water management program and implement any changes in the program, as necessary, in order to require construction site dischargers to reduce pollutants in runoff from construction sites during all construction phases. At a minimum, the program shall address:

   a. Pollution prevention measures and public education

   b. Grading Ordinance and any other local requirements

   c. Verification of coverage under the State's General Permit

   d. Prioritization and inspection of construction sites

   e. Procedures for reporting non-compliance

   f. Procedures for review and approval of WQMP.

      The permittees shall require applicants to prepare a WQMP in accordance with Appendix B of the ROWD and to incorporate identified structural and non-structural BMPs into the development.

   g. Implementation of the new development BMPs, or identification of wateshed or sub-watershed BMPs that new development projects could participate in.

4. The permittees shall review and revise the storm water management program and implement any changes in the program, as necessary in order to require

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industrial/commercial site dischargers to reduce pollutants in runoff from new industrial/commercial sites. At a minimum, this program shall address:

a. Pollution prevention measures and public education

b. Source identification and prioritization

c. Monitoring and inspection of industrial/commercial sites

d. Verification of coverage under the State's General Permit

e. Enforcement of local ordinances and other requirements for industrial/commercial sites

f. Procedures for reporting non-compliance.

g. Procedures for review and approval of WQMP.

The permittees shall require applicants to prepare a WQMP in accordance with Appendix B of the ROWD and incorporate identified structural and non-structural BMPs into the development.

5. The permittees shall minimize the short and long-term impacts on receiving water quality from new developments and re-developments within its jurisdiction as required in Section B.1 below. In order to reduce pollutants and runoff flows from new developments and re-developments to the maximum extent practicable, permittees shall at a minimum:

a. Review General Plan/CEQA Processes to address storm water issues

b. Review and modify project approval process

c. Conduct public and business education.

6. By February 15, 2003, the permittees shall review their planning procedures and CEQA document preparation processes to ensure that storm water-related issues are properly considered and addressed. If necessary, these processes should be revised to consider and mitigate impacts to storm water quality. These changes may include revising the General Plan, modifying the project approval processes, including a section on urban runoff related water quality issues in the CEQA checklist, and conducting training for project proponents. The findings of this review and the actions taken by the permittees shall be reported to the Regional Board in the annual report for the corresponding year that the review is completed. All actions found necessary shall be completed by February 15, 2004 and reported in the annual report for the corresponding year. The following potential impacts shall be considered during CEQA review:

a. Potential impact of project construction on storm water runoff.

b. Potential impact of project's post-construction activity on storm water runoff.

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c. Potential for discharge of storm water pollutants from areas of material storage, vehicle or equipment fueling, vehicle or equipment maintenance (including washing), waste handling, hazardous materials handling or storage, delivery areas or loading docks, or other outdoor work areas.

d. Potential for discharge of storm water to affect the beneficial uses of the receiving waters.

e. Potential for significant changes in the flow velocity or volume of storm water runoff to cause environmental harm.

f. Potential for significant increases in erosion of the project site or surrounding areas.

7. By July 1, 2004, the permittees shall review their watershed protection principles and policies in their General Plan or related documents (such as Development Standards, Zoning Codes, Conditions of Approval, Development Project Guidance) to ensure that these principles and policies are properly considered and are incorporated into these documents. The findings of this review and the actions taken by the permittees shall be reported to the Regional Board by November 15, 2004. These principles and policies shall include the following considerations:

a. Limit disturbance of natural water bodies and drainage systems; conserve natural areas; protect slopes and channels; minimize impacts from storm water and urban runoff on the biological integrity of natural drainage systems and water bodies;

b. Minimize changes in hydrology and pollutant loading; require incorporation of controls including structural and non-structural BMPs to mitigate any projected increases in pollutant loads and flows; ensure that post-development runoff rates and velocities from a site do not adversely impact downstream erosion, stream habitat; minimize the quantity of storm water directed to impermeable surfaces and the MS4s; maximize the percentage of permeable surfaces to allow more percolation of storm water into the ground;

c. Preserve wetlands, riparian corridors, and buffer zones; establish reasonable limits on the clearing of vegetation from the project site;

d. Encourage the use of water quality wetlands, biofiltration swales, watershed-scale retrofits, etc., where such measures are likely to be effective and technically and economically feasible;

e. Provide for appropriate permanent measures to reduce storm water pollutant loads in storm water from the development site; and

f. Establish development guidelines for areas particularly susceptible to erosion and sediment loss.

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8. Each permittee shall provide the Regional Board with the draft amendment or revision when a pertinent General Plan element or the General Plan is noticed for comment in accordance with Government Code Section 65350 et seq.

9. By September 1, 2003, the permittees shall review and, as necessary, revise their current grading/erosion control ordinances in order to reduce erosion caused by new development or significant re-development projects.

10. The permittees shall, through conditions of approval, ensure proper maintenance and operation of any permanent flood control structures installed in new developments. The parties responsible for the maintenance and operation of the facilities, and a funding mechanism for operation and maintenance shall be identified prior to approval of the project.

11. By November 15, 2003, the principal permittee shall submit a proposal for a study to evaluate the effectiveness of a group of selected BMPs for controlling erosion during new development. Based on the results of this study, one or more BMPs will be identified as (a) County-preferred BMP(s) for erosion control during new development. This proposal shall include details of the new development project site, the BMPs selected for the study, and a proposed schedule. The proposal and final BMP selection shall be approved by the Regional Board Executive Officer and the study shall be completed by the end of this permit term.

12. The permittees shall continue to implement BMPs for new development and for public works construction.

13. By July 1, 2003, the permittees shall review their Guidelines for New Development and Redevelopment to determine the need for any revisions.

B. WATER QUALITY MANAGEMENT PLAN (WQMP) FOR URBAN RUNOFF (FOR NEW DEVELOPMENT/SIGNIFICANT RE-DEVELOPMENT)

1. By January 1, 2004 , the permittees shall review their existing BMPs for new developments and submit for review and approval by the Executive Officer, a revised WQMP for urban runoff from new developments/significant re-developments for the type of projects listed below:

   a. All significant re-development projects. Significant re-development is defined as the addition or creation of 5,000 or more square feet of impervious surface on an already developed site. This includes, but is not limited to, additional buildings and/or structures, extension of existing footprint of a building, construction of parking lots, etc. Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to these SUSMPs, the design

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standards apply only to the addition, and not the entire development.

b. Home subdivisions of 10 units or more. This includes single family residences, multi-family residence, condominiums, apartments, etc.

c. Industrial/commercial developments of 100,000 square feet or more. Commercial developments include non-residential developments such as hospitals, educational institutions, recreational facilities, mini-malls, hotels, office buildings, warehouses, and light industrial facilities.

d. Automotive repair shops (with SIC codes 5013, 5014, 5541, 7532-7534, 7536-7539).

e. Restaurants where the land area of development is 5,000 square feet or more.

f. Hillside developments of 10,000 square feet or more which are located on areas with known erosive soil conditions or where the natural slope is twenty-five percent or more.

g. Developments of 2,500 square feet of impervious surface or more adjacent to (within 200 feet) or discharging directly into environmentally sensitive areas such as areas designated in the Ocean Plan as areas of special biological significance or waterbodies listed on the CWA Section 303(d) list of impaired waters.

h. Parking lots of 5,000 square feet or more exposed to storm water. Parking lot is defined as land area or facility for the temporary storage of motor vehicles.

2. The permittees are encouraged to include in the WQMP the development and implementation of regional and/or watershed management programs that address runoff from new development and significant re-development. The WQMP shall include BMPs for source control, pollution prevention, and/or structural treatment BMPs. For all structural treatment controls, the WQMP shall identify the responsible party for maintenance of the treatment systems, and a funding source or sources for its operation and maintenance. The goal of the WQMP is to develop and implement programs and policies to minimize the effects of urbanization on site hydrology, urban runoff flow rates or velocities and pollutant loads. This goal may be achieved through watershed-based structural treatment controls, in combination with site-specific BMPs. The WQMP shall reflect consideration of the following goals, which may be addressed through on-site and/or watershed based BMPs.

   a. The pollutants in post-development runoff shall be reduced using controls that utilize best available technology (BAT) and best conventional technology (BCT).

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b. The discharge of any listed pollutant to an impaired waterbody on the 303(d) list shall not cause or contribute to an exceedance of receiving water quality objectives.

3. Pending revision of the WQMP requirements, the permittees shall implement their proposed program detailed in Section 4 of the ROWD. If the Executive Officer does not approve the revised WQMP by June 1, 2004, as meeting the goals proposed in Section XII.B.2, above, and providing an equivalent or superior degree of treatment as the sized criteria outlined below, structural BMPs shall be required for all new development and significant redevelopment[5]. Minimum structural BMPs must either be sized to comply with one of the following numeric sizing criteria or be deemed by the principal permittee to provide equivalent or superior treatment, either on a site basis or a watershed basis:

a. Volume

Volume-based BMPs shall be designed to infiltrate or treat either:

1) The volume of runoff produced from a 85th percentile 24-hour storm event, as determined from the local historical rainfall record[6]; or

2) The volume of annual runoff produced by the 85th percentile 24-hour rainfall event, determined as the maximized capture storm water volume for the area, from the formula recommended in Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87 (1998); or

3) The volume of annual runoff based on unit basin storage volume, to achieve 80% or more volume treatment by the method recommended in California Stormwater Best Management Practices Handbook – Industrial/commercial (1993); or

4) The volume of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile 24-hour runoff event;

OR

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[5] Where new development is defined as projects for which tentative tract or parcel map approval was not received by June 1, 2004 and new re-development is defined as projects for which all necessary permits were not issued by June 1, 2004. However, projects that have not commenced grading by the initial expiration date of the tentative tract or parcel map approval shall be deemed a new development project as defined in this section. New development does not include projects receiving map approvals after June 1, 2004 that are proceeding under a common scheme of development that was the subject of a tentative tract or parcel map approval that occurred prior to June 1, 2004.

[6] The Permittees are encouraged to calculate the 85th percentile storm event for each of their jurisdictions using local rain data pertinent to their jurisdiction.

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b. Flow

Flow-based BMPs shall be designed to infiltrate or treat either:

1) The maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour; or

2) The maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from the local historical rainfall record, multiplied by a factor of two; or

3) The maximum flow rate of runoff, as determined from the local historical rainfall record, that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile hourly rainfall intensity multiplied by a factor of two.

The permittees may propose any equivalent sizing criteria for treatment BMPs or other controls that will achieve greater or substantially similar pollution control benefits. In the absence of approved equivalent sizing criteria, the permittees shall implement the above stated sizing criteria. If a particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance or if the cost of BMP implementation greatly outweighs the pollution control benefits, the permittees may grant a waiver of the numeric sizing criteria. All waivers, along with waiver justification documentation must be reported to the Regional Board in writing within 30 days. The permittees may propose to establish an urban runoff fund to be used for urban water quality improvement projects within the same watershed that is funded by contributions from developers granted waivers. If it is determined by the Regional Board that waivers are being inappropriately granted, this Order may be reopened to modify these waiver conditions.

The obligation to install minimum structural BMPs at new development is met if, for a common scheme of development, BMPs are constructed with the requisite capacity to serve the entire common scheme, even if certain phases of the common scheme may not have BMP capacity located on that phase in accordance with the requirements specified above.

C. GROUNDWATER PROTECTION

Any structural infiltration BMPs shall meet the following minimum requirements:

1. Use of structural infiltration treatment BMPs shall not cause or contribute to an exceedance of groundwater water quality objectives.

2. Source control and pollution prevention control BMPs shall be implemented to protect groundwater quality.

3. Structural infiltration treatment BMPs shall not be used in industrial or high vehicular traffic areas (25,000 or greater average daily traffic).

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4. Structural infiltration treatment BMPs shall be located at least 100 feet horizontally from any water supply wells.

5. The vertical distance from the bottom of any infiltration structural treatment BMP to the historic high groundwater mark shall be at least 10 feet.

6. Structural infiltration treatment BMPs shall not cause a nuisance or pollution as defined in Water Code Section 13050.

XIII. PUBLIC EDUCATION AND OUTREACH

1. The permittees shall continue to implement the public education efforts already underway and shall implement all elements of the comprehensive public and business education strategy contained in the ROWD. By October 30, 2002, the permittees shall complete a public awareness survey to determine the effectiveness of the current public and business education strategy.

2. When feasible, the permittees shall participate in a joint outreach with other programs including, but not limited to, the State of California Storm Water Quality Task Force, Caltrans, and other municipal storm water programs to ensure that a consistent message on storm water pollution prevention is disseminated to the public. The permittees shall sponsor or staff a storm water table or booth at community, regional, and/or countywide events to distribute public education materials to the public. Each permittee shall participate in at least one event per year.

3. By January 15, 2003, the Management Committee shall make recommendations for any changes to the public and business education program. The goal of the public and business education program shall be to target 100% of the residents including businesses, commercial and industrial establishments. Through use of local print, radio and television, the permittees must ensure that the public and business education program makes a minimum of 5 million impressions per year and that those impressions measurably increase the knowledge and measurably change the behavior of the targeted groups. By January 15, 2003, the Management Committee shall propose a study for measuring changes in knowledge and behavior as a result of the education program. Upon approval by the Regional Board Executive Officer, the study shall be completed by the end of the permit cycle. The Committee shall ensure implementation of BMPs listed in the ROWD (Appendix C) for restaurants, automotive service centers, gasoline service stations and other similar facilities. The permittees shall distribute these BMP brochures or fact sheets to these facilities during inspections and/or through other means. Further, for restaurant, automotive service centers, and gasoline service station corporate chains, information is to be developed that will be provided to corporate environmental managers during outreach visits that will take place during the permit term.

4. By September 15, 2002, the permittees shall develop public education materials to encourage the public to report (including a hotline telephone number to report)

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illegal dumping from residential, industrial, construction and commercial sites into public streets, storm drains and other waterbodies, clogged storm drains, faded or missing catch basin stencils and general storm water and BMP information. This hotline and website shall be included in the public and business education program and shall be listed in the governmental pages of all regional phone books.

5. By September 1, 2003, the permittees shall develop BMP guidelines for the control of those potentially polluting activities not otherwise regulated by any agency including guidelines for the household use of fertilizers, pesticides, herbicides, and other chemicals, guidelines for mobile vehicle maintenance activities, carpet cleaners, commercial landscape maintenance, and pavement cutting. These guidelines shall be distributed to the public, trade associations, etc., through participation in community events, trade association meetings, and/or mail.

6. By September 1, 2003, the permittees shall conduct an evaluation to determine the best method of establishing a mechanism(s) for providing educational and General Industrial Permit materials to businesses within their jurisdiction. These mechanism(s) for distributing educational materials to businesses shall be implemented by March 1, 2004.

XIV. MUNICIPAL FACILITIES/ACTIVITIES

1. Each permittee shall adopt the performance goals and implement the commitments included under Section 5.5 of the ROWD to prevent public agency facilities and activities from causing or contributing to a pollution or nuisance in receiving waters.

2. By September 1, 2003, the permittees shall complete an assessment of their flood control facilities to evaluate opportunities to configure and/or to reconfigure channel segments to function as pollution control devices and to optimize beneficial uses. These modifications may include in-channel sediment basins, bank stabilization, water treatment wetlands, etc. This shall be reported in the 2002-2003 annual report.

3. By July 1, 2003, the permittees, in coordination with the San Bernardino County Fire Chiefs Association, shall develop a list of appropriate BMPs to be implemented to reduce pollutants from training activities, fire hydrant/sprinkler testing or flushing, non-emergency fire fighting, and any BMPs feasible for emergency firefighting flows.

4. By October 1, 2002, the Management Committee shall develop and distribute to all permittees a BMP fact sheet to address public agency activities such as road construction and maintenance, street sweeping, catch basin stenciling, drainage facility cleaning and maintenance, etc. This shall be reported in the 2002-2003 annual report.

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5. By October 1, 2002, the Management Committee shall develop and distribute BMP guidelines for public agency and contract field operations and maintenance staff. These guidelines shall describe appropriate pollution control measures, appropriate response to spills and illegal discharges, etc. Contractor training requirements shall be included in new contracts and contracts that come up for renewal. This shall be reported in the 2002-2003 annual report.

6. At least on an annual basis, each permittee shall provide training to public agency staff and to contract field operations staff on fertilizer and pesticide management, model maintenance procedures, and implementation of other pollution control measures. Each permittee shall designate key staff involved in public agency activities to attend at least three such training sessions during the five-year term of this permit (from 2002-2007).

7. By July 1, 2003, the Management Committee shall evaluate the efficiency and cost effectiveness of the available BMPs for litter control and develop recommendations for any needed improvements. This shall be reported in the 2002-2003 annual report.

8. Each permittee shall identify areas that are not subject to street sweeping due to lack of continuous curb and gutter, and evaluate their potential for impacting storm water quality. Appropriate BMPs shall be implemented where significant water quality impact is identified. This shall be reported in the 2002-2003 annual report.

9. Each permittee shall inspect all of their inlets, open channels, and basins at least once during each reporting year and maintain at least 80% of its drainage facilities on an annual basis, with 100% of the facilities included in a two-year period, using the BMP fact sheet developed by the Management Committee. The inspection and maintenance frequency for all or portions of the drainage facilities shall be evaluated annually to determine the need for increasing the inspection and maintenance frequency. This information shall be included in the annual report.

10. Each permittee shall clean those drainage facilities where the inspection reveals that the sediment/storage volume is 25% full, or where there is evidence of illegal discharge or if accumulated sediment or debris impairs the hydraulic capacity of the facility.

11. Successful implementation of the provisions in this Order will require the cooperation of all the public agency organizations within San Bernardino County having programs/activities that have an impact on storm water quality (e.g., Fire Department, Department of Environmental Health, Planning Department, Transportation Department, Parks and Recreation, Building and Safety, Code Enforcement, etc.) As such, these organizations are expected to actively participate in implementing this area-wide storm water program. The permittees shall be responsible for involving the public agencies in their storm water program.

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XV. MUNICIPAL CONSTRUCTION PROJECTS/ACTIVITIES

1. This Order authorizes the discharge of storm water runoff from construction projects that may result in land disturbance of five (5) acres or more (or less than five acres, if it is part of a larger common plan of development or sale which is five acres or more) that are under ownership and/or direct responsibility of any of the permittees.

2. No later than March 10, 2003 or as specified in the latest version of the State General Stormwater Construction Permit, the permittees shall comply with the requirements for municipal construction projects that may result in land disturbance greater than one acre.

3. Prior to commencement of construction activities, the permittees shall notify the Executive Officer of the Regional Board of the proposed construction project. Upon completion of the construction project, the Executive Officer shall be notified of the completion of the project.

4. The permittees shall develop and implement a storm water pollution prevention plan (SWPPP) and a monitoring program that is specific for the construction project prior to the commencement of any of the construction activities. The SWPPP shall be kept at the construction site and released to the public and/or Regional Board staff upon request.

5. The SWPPP and the monitoring program for the construction projects shall be consistent with the requirements of the latest version of the State's General Construction Activity Storm Water Permit.

6. The permittees shall give advance notice to the Executive Officer of the Regional Board of any planned changes in the construction activity, which may result in non-compliance with the latest version of the State's General Construction Activity Storm Water Permit.

7. All other terms and conditions of the latest version of the State's General Construction Activity Storm Water Permit shall be applicable.

XVI. PROGRAM MANAGEMENT/MSWMP REVIEW

1. By October 1 of each year, the permittees shall evaluate the MSWMP to determine the need for any revisions. At a minimum, the first annual review after adoption of this Order shall include:

   a. A description of any additional formal training needs for municipal employees.

   b. A description of the need for additional coordination meeting/training for the designated NPDES inspectors.

2. The annual report submitted each year shall include the findings of the MSWMP review and a schedule for any needed revisions.

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3. The permittees shall modify the MSWMP, at the direction of the Regional Board Executive Officer, to, as necessary, incorporate additional provisions. Such provisions may include regional and watershed-specific requirements and/or waste load allocations developed and approved pursuant to the TMDL process for impaired water bodies.

4. The Management Committee will continue to meet at least 11 times a year to discuss issues related to permit implementation and regional and statewide issues. Each permittee's designated representative or a designated alternate should attend not less than 9 out of 11 meetings.

XVII. FISCAL RESOURCES

The permittees shall provide adequate funding for administration, implementation and enforcement of the areawide storm water management program elements and local storm water programs. The permittees shall prepare and submit a unified fiscal analysis to the Executive Officer of the Regional Board. The fiscal analysis shall be submitted with the Annual Report each year and shall, at a minimum, include the following:

1. Each permittee's expenditures for the previous fiscal year,
2. Each permittee's budget for the current fiscal year,
3. A description of the source of funds, and
4. Each permittee's estimated budget for the next fiscal year.

XVIII. PROVISIONS

GENERAL

1. All reports submitted by the permittees as per the requirements in this Order for the approval of the Executive Officer shall be publicly noticed and made available on the Regional Board's website, or through other means, for public review and comments. The Executive Officer shall consider all comments received prior to approval of the reports. Any unresolved issues shall be scheduled for a public hearing at a Regional Board meeting prior to approval by the Executive Officer.

2. The purpose of this Order is to require the implementation of best management practices to reduce, to the maximum extent practicable, the discharge of pollutants from the MS4 in order to support reasonable further progress towards attainment of water quality objectives.

3. Permittees shall demonstrate compliance with all the requirements in this Order and specifically with Section III. Discharge Limitations, and Section IV. Receiving Water Limitations, through timely implementation of their MSWMP, its components and any modifications, revisions, or amendments developed pursuant to this Order approved by the Executive Officer or determined by the permittee to be necessary to meet the requirements of this Order. The MSWMP and its components, as

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included in the ROWD, including any approved amendments thereto is hereby made an enforceable component of this Order.

4. Certain BMPs implemented or required by the permittees for urban runoff management may create habitat for vectors (e.g., mosquitoes and rodents) if not properly designed and maintained. Close collaboration and cooperative effort between the permittees and local vector control agencies and the State Department of Health Services during the development and implementation of urban runoff management programs are necessary to minimize potential vector habitat and public health impacts resulting from vector breeding. Nothing in this permit is intended to prohibit inspection or abatement of vectors by the State or local vector control agencies in accordance with the respective Health and Safety Code.

5. The permittees shall, at a minimum, implement all elements of the MSWMP and its components, as included in the ROWD. Where the dates are different from the corresponding dates in this Order, the dates in this Order shall prevail. Any proposed revisions to the MSWMP shall be submitted with the Annual Report to the Executive Officer of the Regional Board for review and approval. All approved revisions to the MSWMP shall be implemented as per the time schedules approved by the Executive Officer. In addition to those specific controls and actions required by: (1) the terms of this Order and (2) the MSWMP and its components, each permittee shall implement additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order.

6. The permittees shall comply with Monitoring and Reporting Program No. R8-2002-0012 and any revisions thereto, which are hereby made a part of this Order. The Executive Officer is hereby authorized to revise the Monitoring and Reporting Program in a manner consistent with this Order to allow the permittees to participate in regional, statewide, national or other monitoring programs in lieu of or in addition to Monitoring and Reporting Program No. R8-2002-0012.

7. Upon approval by the Executive Officer of the Regional Board, all plans, reports and subsequent amendments required by this Order shall be implemented and shall become an enforceable part of this Order. Prior to approval by the Executive Officer, these plans, reports and amendments shall not be considered as an enforceable part of this Order.

8. The permittees shall report to the Executive Officer of the Regional Board:

   a. Any enforcement actions and discharges of storm or non-storm water, known to the permittees, which may have an impact on human health or the environment, and

   b. Any suspected or reported activities on federal, state, or other entity's land or facilities, where the permittees do not have any jurisdiction, and where the suspected or reported activities may be contributing pollutants to waters of the US.

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9. The permittees shall immediately report any discharge that may endanger human health or the environment including any unauthorized discharge to the Executive Officer or his designee (909-782-3238, or by e-mail to: sw@rb8.swrcb.ca.gov) and to the Office of Emergency Services (1-800-852-7550). This reporting should be done by phone or e-mail as soon as the permittees become aware of the circumstances. A written report of the discharge or incident shall be submitted to the Executive Officer within five days.

10. The permittees shall not issue occupancy permits unless the applicant is informed of his obligation under the State's General Industrial Activities Storm Water Permit. The permittees shall not issue any grading permit for construction activities which will disturb five acres or more (or less than five acres, if it is part of a larger common plan of development or sale which is five acres or more or when Phase II requirements become effective) until proof of coverage with the State's General Construction Activity Storm Water Permit is verified. The proof of coverage may include a letter from the Regional Board office, a copy of the Notice of Intent, Waste Discharger Identification number, etc.

11. The permit application and special NPDES program requirements are contained in 40 CFR 122.21 (a), (b), (d)(2), (f), (p); 122.41 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l); and 122.42 (c), and are incorporated into this Order by reference.

XIX. PERMIT EXPIRATION AND RENEWAL

1. This Order expires on April 27, 2007 and the permittees must file a new Report of Waste Discharge (permit application) no later than 180 days in advance of such expiration date as application for issuance of new waste discharge requirements. The Report of Waste Discharge shall, at a minimum, include the following:

   a. Any revisions to the Report of Waste Discharge including, but not limited to, all the activities the permittees propose to undertake during the next permit term, goals and objectives of such activities, an evaluation of the need for additional source control and/or structural BMPs, any proposed pilot studies, etc.;

   b. Changes in land use and/or population including map updates;

   c. Any significant changes to the storm drain systems, outfalls, detention or retention basins or dams, and other controls including map updates of the storm drain systems; and

   d. Any new or revised program elements and compliance schedule(s) necessary to comply with Section IV of this Order.

2. This Order may be modified, revoked or reissued prior to its expiration date for the following reasons:

   a. To address significant changes in conditions identified in the technical reports required by the Regional Board which were unknown at the time of

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the issuance of this Order;

b. To incorporate applicable requirements of statewide water quality control plans adopted by the State Water Resources Control Board or any amendments to the Basin Plan approved by the Regional Board, the State Board, and, if necessary, by the Office of Administrative Law;

c. To comply with any applicable requirements, guidelines, or regulations issued or approved under the Clean Water Act, if the requirements, guidelines, or regulations contain different conditions or additional requirements than those included in this Order; or

d. To incorporate any requirements imposed upon the permittees through the TMDL process.

3. This Order shall serve as an NPDES Permit pursuant to Section 402 (p) of the Clean Water Act, or amendments thereto, and shall become effective ten days after the date of its adoption provided the Regional Administrator of the U. S. EPA has no objections. If the Regional Administrator objects to its issuance, the permit shall not become effective until such objection is withdrawn.

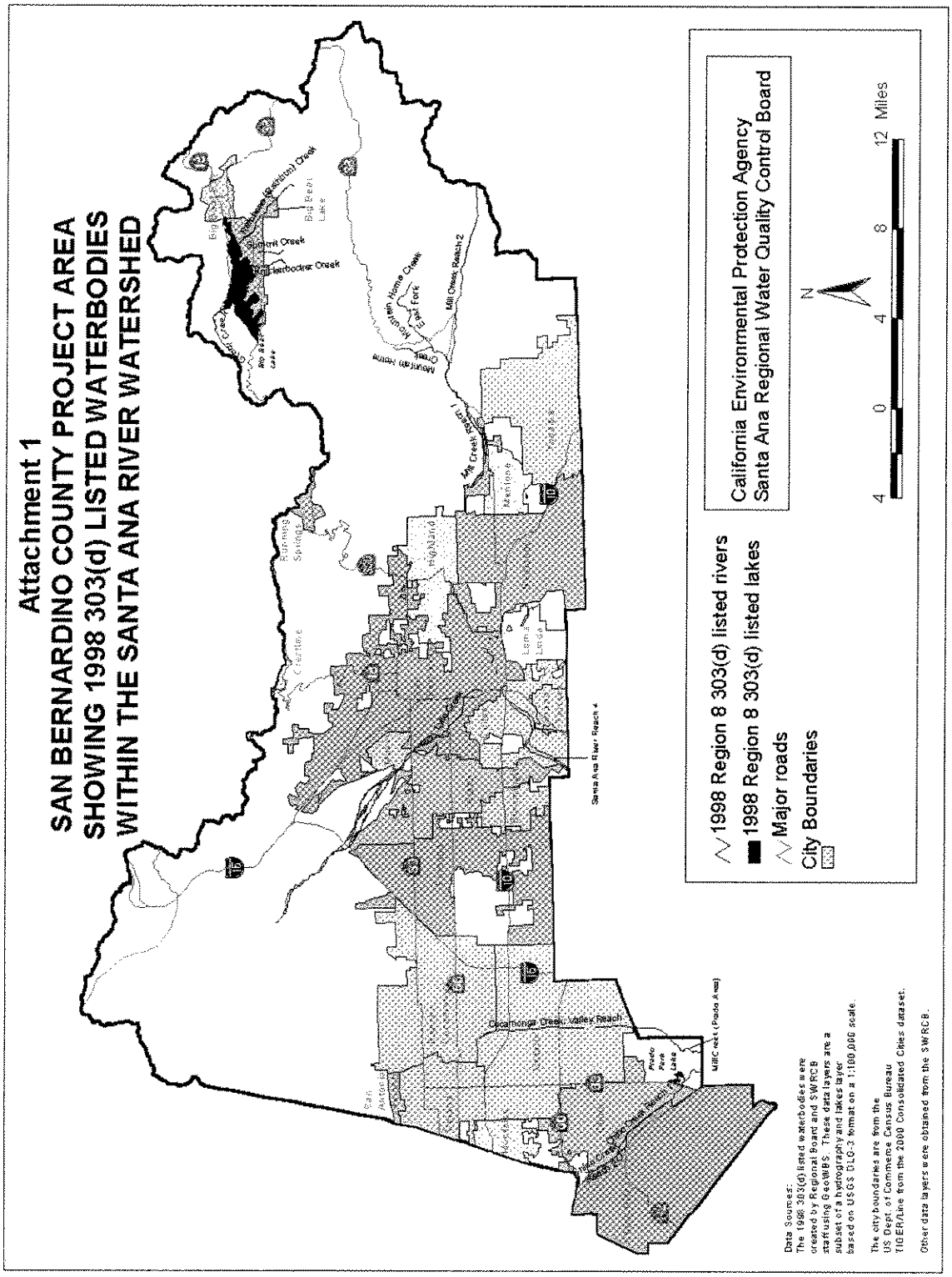
4. Order No. 96-32 is hereby rescinded.

I, Gerard Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on April 26, 2002.

_____

Gerard J. Thibeault

Executive Officer


Attachment 1
SAN BERNARDINO COUNTY PROJECT AREA
SHOWING 1998 303(d) LISTED WATERBODIES
WITHIN THE SANTA ANA RIVER WATERSHED
1998 Region 8 303(d) listed rivers
1998 Region 8 303(d) listed lakes
Major roads
City Boundaries
California Environmental Protection Agency
Santa Ana Regional Water Quality Control Board
N
4 0 4 8 12 Miles
Data Sources:
The 1998 303(d) listed waterbodies were created by Regional Board and SWRCB staff using GeoMAS. These data layers are a subset of a hydrography and lakes layer based on USGS DLG-3 format on a 1:100,000 scale.
The city boundaries are from the US Dept. of Commerce Census Bureau TIGER/Line from the 2000 Consolidated Cities dataset.
Other data layers were obtained from the SWRCB.
Santa Ana River, Reach 4
Cucamonga Creek, Valley Reach
Mill Creek, Upper Reach
Mill Creek (Prado Area)
Prado Park Lake
Mill Creek, Reach 1
Mill Creek, Reach 2
Mill Creek, Reach 3
Mountain Home Creek, East Fork
Mountain Home Creek
Big Bear Lake
Baldwin Lake
Rathbone Creek
Rathbone Creek, Reach 1
Rathbone Creek, Reach 2
Rathbone Creek, Reach 3
Rathbone Creek, Reach 4
Rathbone Creek, Reach 5
Rathbone Creek, Reach 6
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Attachment 2

Inland Surface Streams

A. Santa Ana River

Santa Ana River, Reaches 4, 5, and 6

B. San Bernardino Mountain Streams

Mill Creek Drainage

Mill Creek, Reaches 1 and 2

Mountain Home Creek

Mountain Home Creek, East Fork

Monkey Face Creek

Alger Creek

Falls Creek

Vivian Creek

High Creek

Other Tributaries: Lost, Oak Cove, Green, Skinner, Momyer and Glen Martin Creeks, and other Tributaries to these Creeks

Bear Creek Drainage

Bear Creek

Siberia Creek

Slide Creek

All Other Tributaries to these Creeks

Big Bear Lake Tributaries

North Creek

Metcalf Creek

Grout Creek

Rathbone (Rathbun) Creek

Other Tributaries to Big Bear Lake: Johnson, Minnelusa, Polique, and Red Ant Creeks, and other Tributaries to these Creeks

Baldwin Lake Drainage

Shay Creek

Other Tributaries to Baldwin Lake: Sawmill, Green, and Caribou Canyons and other Tributaries to these Creeks.

C. Other Streams Draining to Santa Ana River (Mountain Reaches)

Cajon Creek

City Creek

Devil Canyon Creek

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East Twin and Strawberry Creeks

Waterman Canyon Creek

Fish Creek

Forsee Creek

Plunge Creek

Barton Creek

Bailey Canyon Creek

Kimbark Canyon, East Fork Kimbark Canyon, Ames Canyon and West Fork Cable Canyon Creeks

Valley Reaches of Above Streams

Other Tributaries (Mountain Reach): Alder, Badger Canyon, Bledsoe Gulch, Borea Canyon, Breakneck, Cable Canyon, Cienega Seca, Cold, Converse, Coon, Crystal, Deer, Elder, Fredalba, Frog, Government, Hamilton, Heart Bar, Hemlock, Keller, Kilpecker, Little Mill, Little Sand Canyon, Lost, Meyer Canyon, Mile, Monroe Canyon, Oak, Rattlesnake, Round Cienega, Sand, Schneider, Staircase, Warm Springs Canyon and Wild Horse Creeks, and other tributary to these Creeks.

D. San Gabriel Mountain Streams (Mountain Reaches)

San Antonio Creek

Lytle Creek (South, Middle, and North Forks) and Coldwater Canyon Creek

Day and East Etiwanda Creeks

Valley Reaches of Above Streams

Cucamonga Creek (Mountain Reach)

Cucamonga Creek (Valley Reach)

Other Tributaries (Mountain Reaches): San Sevaine, Deer, Duncan Canyon, Henderson Canyon, Stoddard Canyon, Icehouse Canyon, Cascade Canyon, Cedar, Falling Rock, Kerkhoff and Cherry Creeks, and other Tributaries to these Creeks.

E. San Timoteo Area Streams

San Timoteo Creek, Reaches 1 and 2

Oak Glen, Potato Canyon and Birch Creeks

Yucaipa Creek

F. Prado Area Streams

Chino Creek

G. Lake and Reservoirs

Baldwin Lake

Big Bear Lake

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Jenks Lake

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Attachment 3

LIST OF OTHER ENTITIES WITH THE POTENTIAL TO DISCHARGE POLLUTANTS TO THE SAN BERNARDINO COUNTY STORM WATER CONVEYANCE SYSTEM[7]

Government Agencies

U.S. Army Corps of Engineers

U.S. Department of Agriculture - Forest Services, San Bernardino County National Forest

California Department of Transportation (Cal Trans)

California Department of Parks and Recreation - Chino Hills State Park

Inland Valley Development Agency, San Bernardino International Trade Center and Airport

Hospitals

Bear Valley Community Hospital

Chino Community Hospital

Doctors Hospital

Kaiser Foundation Hospital

Loma Linda Community Hospital

Loma Linda University Medical Center

Mountains Community Hospital

Ontario Community Hospital

Patton State Hospital

U.S. Department of Veterans Affair - Jerry L. Pettis Memorial Veterans Medical Center

Redlands Community Hospital

St. Bernardino Medical Center

San Antonio Community Hospital

San Bernardino Community Hospital

San Bernardino County Hospital

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[7] If any entity on this list is determined to cause or contribute to violations of this Order, the RWQCB will require the entity to either:1) secure an NPDES permit; or 2) become a permittee under this permit if acceptable to the existing permittees and subject to execution of the implementation agreement. Please refer to Finding 24 on page 8 of this Order.

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Railroads

AT&SF Railway Company

Southern Pacific Railroad Company

School Districts

Alta Loma Elementary School District

Bear Valley Unified School District

Central Elementary School District

Chaffey Joint Union High School District

Chino Valley Unified School District

Colton Joint Unified School District

Cucamonga Elementary School District

Etiwanda Elementary School District

Fontana Unified School District

Mountain View Elementary School District

Mt. Baldy joint Elementary School District

Ontario-Montclair Elementary School District

Rialto Unified School District

Rim of the World Unified School District

Redlands Unified School District

San Bernardino City Unified School District

Upland Unified School District

Yucaipa Joint Unified School District

Universities and Colleges

California State University - California State University San Bernardino

San Bernardino Community College District - Chaffey College Campus

San Bernardino Community College District - Crafton Hills College Campus

San Bernardino Community College District - San Bernardino Valley College Campus

University of Redlands

Loma Linda University

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Water Districts

- Big Bear Municipal Water District
- Inland Empire Utilities Agency
- Cucamonga County Water District
- East Valley Water District
- Monte Vista Water District
- San Bernardino Valley Municipal Water District
- West San Bernardino County Water District
- Yucaipa Valley Water District

Transportation

- Omnitrans
- Metrolink (Fontana, Montclair, Ontario, Rancho Cucamonga, Rialto, San Bernardino)
- Redlands Municipal Airport
- Rialto Municipal Airport
- Chino Airport
- Cable Airport

Other Potential Dischargers

- United States Postal Service
- California National Guard

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ATTACHMENT 4

GLOSSARY

Beneficial Uses – The uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote the tangible and intangible economic, social, and environmental goals. "Beneficial Uses" that may be protected against include, but are not limited to: domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. "Beneficial Uses" are equivalent to "Designated Uses" under federal law. [California Water Code Section 13050(f)].

Best Available Technology (BAT) – BAT is the acronym for best available technology economically achievable. BAT is the technology-based standard established by congress in CWA section 402(p)(3)(A) for industrial dischargers of storm water. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices, or BMPs. For example, secondary treatment (or the removal of 85% suspended solids and BOD) is the BAT for suspended solid and BOD removal from a sewage treatment plant. BAT generally emphasizes treatment methods first and pollution prevention and source control BMPs secondarily.

The best economically achievable technology that will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants is determined in accordance with regulations issued by the Environmental Protection Agency Administrator. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the permitting authority deems appropriate.

Best Conventional Technology (BCT) – BCT is an acronym for Best Conventional Technology. BCT is the treatment techniques, processes and procedure innovations, and operating methods that eliminate or reduce chemical, physical, and biological pollutant constituents.

Best Management Practices – Best Management Practices (BMPs) are defined in 40 CFR 122.2 as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. In the case of municipal storm water

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permits, BMPs are typically used in place of numeric effluent limits.

Bioaccumulate – The progressive accumulation of contaminants in the tissues of organisms through any route including respiration, ingestion, or direct contact with contaminated water, sediment, pore water, or dredged material to a higher concentration than in the surrounding environment. Bioaccumulation occurs with exposure and is independent of the tropic level.

Biological Integrity – Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. Environmental Management 5:55-68 as: "A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region." Also referred to as ecosystem health.

Clean Water Act Section 402(p) – [33 USC 1342(p)] is the federal statute requiring municipal and industrial dischargers to obtain NPDES permits for their discharges of storm water.

Clean Water Act Section 303(d) Listed Water Body – is an impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology-based pollution controls required by the CWA. The discharge of urban runoff to these water bodies by the Co-permittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Contamination – As defined in the Porter-Cologne Water Quality Control Act, contamination is "an impairment of the quality of waters of the State by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease." 'Contamination' includes any equivalent effect resulting from the disposal of waste whether or not waters of the U.S. are affected.

Debris – Debris is defined as the remains of anything destroyed or broken, or accumulated loose fragments of rock.

Effluent Limitations – Limitations on the volume of each waste discharge, and the quantity and concentrations of pollutants in the discharge. The limitations are designed to ensure that the discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses.

Effluent limitations are limitations of the quantity and concentrations of pollutants in a discharge. The limitations are designed to ensure that the discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses. In other words, an effluent limit is the maximum concentration of a pollutant that a discharge can contain. To meet effluent limitations, the effluent typically must undergo one or more forms of treatment to remove pollutants in order to lower the pollutant concentration below the limit. Effluent limits are typically numeric (e.g., 10 mg/l).

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Erosion – When land is diminished or wane away due to the effects of wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building, and timber harvesting.

Grading – The cutting and/or filling of the land surface to a desired slope or elevation.

Hazardous Material – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the U.S. EPA to be reported if a designated quantity of the material is spilled into the waters of the United States or emitted into the environment.

Illicit Discharge – Any discharge to a municipal separate storm sewer that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term illicit discharge includes all non-storm water discharges except discharges pursuant to an NPDES permit, discharges that are identified in Section III, Discharge Limitations/Prohibitions, of this Order, and discharges authorized by the Regional Board Executive Officer. .

MEP – MEP is the acronym for Maximum Extent Practicable. Maximum Extent Practicable means the standard for implementation of storm water management programs to reduce pollutants in storm water. CWA section 402(p)(3)(B)(iii) requires that municipal permits "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 Adminstrator or the State determines appropriate for the control of such pollutants. Specifically, municipalities must choose effective BMPs, and reject applicable BMPs only where other effective BMPs will serve the same purpose.

Municipal Storm Water Conveyance System – (See Municipal Separate Storm Sewer System or MS4).

Municipal Separate Storm Sewer System (MS4) – MS4 is an acronym for Municipal Separate Storm Sewer System. A Municipal Separate Storm Sewer System is a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains): (i) Owned or operated by a State, city town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting of conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

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Historic and current development make use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water.

National Pollution Discharge Elimination System (NPDES) – Permits issued under Section 402(p) of the Federal Clean Water Act for regulating discharge of pollutants to waters of the United States.

Non-Point Source Pollution (NPS) – Non point source refers to diffuse, widespread sources of pollution. These sources may be large or small, but are generally numerous throughout a watershed. Non Point Sources include but are not limited to urban, agricultural, or industrial areas, roads, highways, construction sites, communities served by septic systems, recreational boating activities, timber harvesting, mining, livestock grazing, as well as physical changes to stream channels, and habitat degradation. NPS pollution can occur year round any time rainfall, snowmelt, irrigation, or any other source of water runs over land or through the ground, picks up pollutants from these numerous, diffuse sources and deposits them into rivers, lakes, and coastal waters or introduces them into ground water.

Non-Storm Water – Non-storm water consists of all discharges to and from a storm water conveyance system that do not originate from precipitation events (i.e., all discharges from a conveyance system other than storm water). Non-storm water includes illicit discharges, non-prohibited discharges, and NPDES permitted discharges. An illicit discharge is defined at 40 CFR 122.26(b)(2) as any discharge to a municipal storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a separate NPDES permit and discharges resulting from emergency fire fighting activities.

Nuisance – As defined in the Porter-Cologne Water Quality Control Act a nuisance is "anything which meets all of the following requirements: 1) Is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. 2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. 3) Occurs during, or as a result of, the treatment or disposal of wastes."

Numeric Effluent Limitations – The typical method by which effluent limits are prescribed for pollutants in waste discharge requirements implementing the federal NPDES regulations. When numeric effluent limits are met at the "end-of-pipe," the effluent discharge generally will not cause water quality standards to be exceeded in the receiving waters (i.e., water quality standards will also be met).

Person – A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof. [40 CFR 122.2].

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Point Source – Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, landfill leachate collection systems, vessel, or other floating craft from which pollutants are or may be discharged.

Pollution – As defined in the Porter-Cologne Water Quality Control Act, pollution is "the alteration of the quality of the waters of the U.S. by waste, to a degree that unreasonably affects either of the following: A) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses." Pollution may include contamination.

Pollutant – A pollutant is broadly defined as any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated.

Pollution Prevention – Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control, treatment, or disposal.

Post-Construction BMPs – A subset of BMPs including structural and non-structural controls which detain, retain, filter, or educate to prevent the release of pollutants to surface waters during the final functional life of development.

Receiving Water Limitations – Waste discharge requirements issued by the SARWQCB typically include both: (1) "Effluent Limitations" (or "Discharge Limitations") that specify the technology-based or water-quality-based effluent limitations; and (2) "Receiving Water Limitations" that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the "Receiving Water Limitations" provision is the provision used to implement the requirement of CWA section 301(b)(1)(C) that NPDES permits must include any more stringent limitations necessary to meet water quality standards.

Sediment – Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

Storm Water – "Storm water" is as defined urban runoff and snowmelt runoff consisting only of those discharges which originate from precipitation events. Storm water is that portion of precipitation that flows across a surface to the storm drain system or receiving waters. Examples of this phenomenon include: the water that flows off a building's roof when it rains (runoff from an impervious surface); the water that flows into streams when snow on the ground begins to melt (runoff from a semi-pervious surface); and the water that flows from a vegetated surface when rainfall is in excess of the rate at which it can infiltrate into the underlying soil (runoff from a pervious surface). When all factors are equal, runoff increases as the perviousness of a surface decreases. During precipitation events in urban areas, rain water picks up and transports pollutants

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through storm water conveyance systems, and ultimately to waters of the United States.

Toxicity – Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies.

Total Maximum Daily Load (TMDL) – The TMDL is the maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under Clean Water Act Section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

Urban Runoff – Urban runoff is defined as all flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

Waste – As defined in California Water Code Section 13050(d), "waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system which applies to solid and semi-solid waste which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, nonhazardous solid waste, and inert waste.

Water Quality Objective – Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)] California's water quality objectives are established by the State/Regional Water Boards in the Water Quality Control Plans.

As stated in the Porter-Cologne Requirements for discharge (CWC 13263): "(Waste discharge) requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne's definition of pollution. A condition of pollution exists when the water quality needed to support designated

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beneficial uses has become unreasonably affected or impaired; in other words, when the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the Clean Water Act.)

Water Quality Standards – are defined as the beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.,) of water and the water quality objectives necessary to protect those uses.

Waters of the United States – Waters of the United States can be broadly defined as navigable surface waters and all tributary surface waters to navigable surface waters. Groundwater is not considered to be a Waters of the United States.

As defined in 40 CFR 122.2, the Waters of the U.S. are defined as: **(a) All waters, which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;** (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition**: (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;** (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.

Watershed – That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SANTA ANA REGION

MONITORING AND REPORTING PROGRAM NO. R8-2002-0012

NPDES NO. CAS618036

FOR

THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, THE COUNTY OF SAN BERNARDINO, AND THE INCORPORATED CITIES OF SAN BERNARDINO COUNTY WITHIN THE SANTA ANA REGION

AREA-WIDE URBAN STORM WATER RUNOFF

I. GENERAL

1) Revisions of the monitoring and reporting program may be necessary to ensure that the discharger is in compliance with requirements and provisions contained in this Order. Revisions may be made by the Executive Officer at any time during the term of this Order, and may include a reduction or increase in the number of parameters to be monitored, the frequency of monitoring, number of sampling locations, or the number of samples collected.

2) All sample collection, handling, storage, and analyses shall be in accordance with 40 CFR Part 136.

3) The permittees are authorized to complement monitoring data from other sources provided those sources are identical to sources in the Santa Ana Watershed.

4) The Executive Officer is authorized to allow the permittees to participate in statewide, national, or other monitoring programs in lieu of this monitoring program.

5) The permittees shall develop and submit a consolidated monitoring program for approval by the Executive Officer of the Regional Board. The consolidated program for water quality monitoring should be capable of attaining the objectives mentioned below.

II. OBJECTIVES

The overall goal of this monitoring program is to develop and support an effective watershed management program. The following are the major objectives of this monitoring program:

1) To define water quality status, trends, and pollutants of concern associated with urban storm water discharges and their impact on the beneficial uses of the receiving waters.

2) To identify the sources of pollutants in storm water runoff to the maximum extent possible.

3) To characterize pollutants and to assess the influence of land use on water quality.

4) To identify significant water quality problems related to storm water discharges within the watershed.

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5) To evaluate the effectiveness of existing management programs, including an estimate of pollutant reductions achieved by the structural and nonstructural BMPs.

6) To identify other sources of pollutants in storm water runoff to the extent possible (e.g., atmospheric deposition, contaminated sediments, other non-point sources, etc.).

7) To conduct monitoring in cooperation with Riverside County for investigation of bacteriological impairments in the upper Santa Ana River.

8) To verify and to control illegal discharges.

9) To identify those waters which without additional action to control pollution from storm water discharges cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the Basin Plan.

10) To evaluate costs and benefits to the stakeholder including the public.

The Principal Permittee has been monitoring storm water and receiving waters since the first permit term. It is recognized that some of these objectives may not have been attainable during the previous permit terms. It is hoped that continuous monitoring for long term shall help to accomplish these objectives. The Regional Board authorizes the Executive Officer to evaluate and determine adequate progress toward meeting each objective.

This Order references three components of the monitoring program: (1) The existing monitoring program shall continue to be implemented until the integrated watershed monitoring program is approved; (2) An integrated watershed monitoring program is to be developed under this Order to identify data gaps and to attain the above-mentioned objectives; and (3) Other regional monitoring efforts where the permittees participate or make monetary contributions.

III. MONITORING PROGRAM REQUIREMENTS

1. By July 1, 2003, the permittees shall complete the GIS-based mapping of drainage area information, including drainage system facilities, land uses, and receiving waters.

2. By December 1, 2003, the permittees shall complete an assessment of the relative pollutant loading from different drainage areas to the receiving waters. This information shall be reported in the annual reports starting in 2004.

3. By December 1, 2003, the permittees shall evaluate the effectiveness of selected BMPs in controlling pollutant loads in urban storm water runoff. The results shall be included in the annual reports starting from 2004.

4. By July 1, 2002, the principal permittee, in collaboration with the co-permittees,

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shall develop and submit for approval of the Executive Officer a bacteriological monitoring program to determine the sources of bacteriological contamination in the Santa Ana River. This program shall include wet and dry weather monitoring in the River and its major tributaries within the permittees' jurisdiction.

5. By July 1, 2003, the permittees shall revise and submit for approval of the Executive Officer an integrated watershed monitoring program geared towards achieving the above stated objectives and additional objectives that the Executive Officer may deem appropriate. In developing this program, the principal permittee is encouraged to seek cooperation with the permittees from the Riverside and Orange Counties. The Executive Officer or his/her designated representative(s) shall facilitate the coordination meetings or subcommittees formed to achieve this goal. The development and implementation of the monitoring program shall be in accordance with the time schedules prescribed by the Executive Officer. At a minimum, the program shall include the following:

   a. Uniform guidelines for quality control, quality assurance, data collection and data analyses.

   b. A mechanism for the collection, analyses and interpretation of existing data from San Bernardino County monitoring programs and other similar programs. These and other data from local, regional or national sources should be utilized to characterize different storm water sources; to determine pollutant generation, transport and fate; to develop a relationship between land use, development size, storm size and the event mean concentration of pollutants; to determine spatial and temporal variances in storm water quality and seasonal and other bias in the collected data; and to identify any unique features of the Santa Ana Watershed. The permittees are encouraged to use data from similar studies, if available.

   c. A description of the monitoring program including:

      1) The number of monitoring stations;

      2) Environmental indicators (e. g., ecosystem, biological, habitat, chemical, sediment, stream health, etc.) chosen for monitoring;

      3) Parameters selected for field screening and for laboratory work; and

      4) Total number of samples to be collected from each station, receiving water and major outfall monitoring, frequency of sampling during wet and dry weather, short duration or long duration storm events, type of samples (grab, 24-hour composite, etc.), and the type of sampling equipment.

   d. A mechanism for analyzing the collected data and interpreting the results including:

      1) An evaluation of the effectiveness of the best management practices,

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and need for any refinement of the management practices;

2) An evaluation of water quality status, trends, and pollutants of concern associated with urban storm water discharges and their impact on the beneficial uses of the receiving waters;

3) Characterization and identification of sources of pollutants in storm water runoff and an assessment of the influence of land use on water quality;

4) Identification of significant water quality problems related to storm water discharges within the watershed;

5) Evaluation of the effectiveness of existing management programs, including an estimate of pollutant reductions achieved by the structural and nonstructural BMPs;

6) Evaluation of sources of bacteriological contamination in the upper Santa Ana River in coordination with Riverside County;

7) Identification of those waters which without additional action to control pollution from storm water discharges cannot reasonably be expected to attain or maintain applicable water quality standards specified in the Basin Plan; and

8) Analysis and interpretation of the collected data to determine the impact of storm water runoff and/or validate any water quality models.

6. The pemittees shall cooperate with the Southern California Coastal Water Research Project (SCCWRP) in regional monitoring and assessment efforts including, but not limited to the evaluation and development of an Index of Biological Integrity for Southern California.

7. The permittees shall coordinate with SCCWRP and the Regional Board to identify appropriate bioassessment station locations. Station selection and sampling scheme shall be identified in the revised Monitoring Program, and sampling should commence no later than October 2003.

8. Pending approval of the integrated watershed monitoring program, the permittees shall continue existing wet weather monitoring at storm drain monitoring Sites 2, 3, and 5, as identified in the approved monitoring program amended on January 24, 2001. The permitees shall focus on source identification and source control efforts based on the results of these and other monitoring efforts.

IV. REPORTING

1. All progress reports and proposed strategies and plans required by this Order shall be signed by the principal permittee and copies shall be submitted to the Executive Officer of the Regional Board under penalty of perjury.

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2. The permittees shall submit an ANNUAL PROGRESS REPORT to the Executive Officer of the Regional Board and to the Regional Administrator of U.S. EPA, Region 9, no later than November 15 of each year. This progress report may be submitted in a mutually agreed upon electronic format. At a minimum, the annual progress report shall include the following:

   a. A review of the status of program implementation and compliance (or non-compliance) with the schedules contained in this Order.

   b. An assessment of the effectiveness of control measures established under the illicit discharge elimination program and the ROWD. The effectiveness may be measured in terms of how successful the program has been in eliminating illicit/illegal discharges and in reducing pollutant loads in storm water discharges.

   c. An assessment of any storm water management program modifications made to comply with Clean Water Act requirements to reduce the discharge of pollutants to the maximum extent practicable.

   d. An analysis and discussion of the monitoring results and any impacts on the receiving waters. Also, recommendations for corrective actions during the upcoming year of management program implementation and monitoring.

   e. An analysis of the effectiveness of the overall storm water management program and identification of proposed programs which will result in the attainment of the water quality standards, and a time schedule to implement the new programs.

   f. An assessment of the public education program (including industrial facilities and construction sites) and educational activities proposed for the upcoming year.

   g. A progress report on the prosecution of illegal dischargers and reduction or elimination of illegal discharges.

   h. An assessment of the permittees' compliance status with the Receiving Water Limitations, Section IV of the Order, including any proposed modifications to the ROWD and MSWMP if the Receiving Water Limitations are not fully achieved.

3. Permittees shall be responsible for the submittal of all required information and materials needed to comply with this Order in a timely manner to the principal permittee. All such submittals shall be signed by a duly authorized representative of the permittee under penalty of perjury.

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V. REPORTING SCHEDULE

All reports required by this Order shall be submitted to the Executive Officer of the Regional Board in accordance with the following schedule:

Reporting Schedule (Order R8-2002-0012)		
ITEM	**COMPLETION DATE/FREQ.**	**REPORT DUE DATE**
II. Evaluate ordinances to determine authority to impose administrative fines for storm water violations	March 1, 2003	Nov. 15, 2003
IV. RECEIVING WATER LIMITATIONS: Pollutant source investigation and control plan to prevent or reduce pollutants from MS4 systems causing or contributing to exceedance of water quality standards	As needed	Nov. 15
V. IMPLEMENTATION AGREEMENT: Evaluate storm water management structure and implementation agreement	Annually	July 1
VI. LEGAL AUTHORITY/ ENFORCEMENT: Review water quality ordinances and provide a report on the effectiveness of these ordinances and their enforcement, in prohibiting different types of discharges	One Time	Nov. 15, 2003
The principal permittee or subcommittee shall develop a restaurant inspection program	March 1, 2003	March 1, 2003
Submit a statement signed by legal counsel that permittee has obtained all necessary authority to comply with this Order through adoption of ordinances and/or municipal code modifications	One Time	March 1, 2004
VII. ILLEGAL/ILLICIT CONNECTIONS; LITTER, DEBRIS AND TRASH CONTROL: Spills , leaks, and/or illegal dumping (with immediate threat to human health or environment) shall be promptly investigated and reported	Ongoing	Within 24 hours by phone or e-mail, written within 10 days
All sewage spills above 1,000 gallons and all reportable quantities of hazardous substance and hazardous waste spills	Ongoing	Within 24 hours
All other spill incidents	Annually	Nov. 15

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Update Illicit connection database on an ongoing basis and report annually	Nov. 15, 2002, annually thereafter	Nov. 15
Identify control measures implemented to reduce and/or eliminate the discharge of trash and debris	Annually	Nov. 15
Review litter/trash control ordinances to determine need for revision	July 1, 2003	Nov.15, 2003
Determine need for additional debris control measures	July 1, 2003	Nov.15, 2003
VIII. MUNICIPAL INSPECTIONS OF CONSTRUCTION SITES: Develop an inventory of all construction sites	January 31, 2003 & updated by Sept. 30 annually thereafter	Nov. 15
IX. MUNICIPAL INSPECTIONS OF INDUSTRIAL FACILITIES: Develop an inventory of industrial facilities with business permits or other authorization that have potential of discharging pollutants to the MS4, provide copy of inspection database	July 1, 2003 & updated annually	Nov. 15
Identify the remaining industrial facilities that do not have business permits or other authorization	September 1, 2005 & updated annually	Nov. 15
X. MUNICIPAL INSPECTIONS OF COMMERCIAL FACILITIES: Develop an inventory of listed commercial facilities that have potential of discharging pollutants to the MS4, provide copy of inspection database	July 1, 2003 & updated annually	Nov. 15
XI. SEWAGE SPILLS, INFILTRATION INTO MS4 SYSTEMS FROM LEAKING SANITARY SEWER LINES, ANS SEPTIC SYSTEM FAILURES:		
Propose a mechanism to determine the effect of septic system failure on storm water quality	One Time	July 1, 2003
Propose a unified response mechanism to respond to any sewage spills	One Time	July 1, 2003
Review current oversight programs for portable toilets to determine the need for any revision	One Time	July 1, 2003
XII.A. NEW DEVELOPMENT (INCLUDING SIGNIFICANT RE-DEVELOPMENT): Establish a	One Time	October 15, 2002

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mechanism to ensure all construction projects and industrial sites filed NOI for coverage under the General Permit prior to issuance of local permits or approvals		
Review and modify approval/permitting process to incorporate BMPs in the Guidelines for New Development and Redevelopment	One Time	September 1, 2002
Review planning procedure and CEQA document preparation process to ensure storm water-related issues are properly considered and addressed	One Time	February 15, 2003
Review and/or incorporate watershed protection principles and policies into the General Plan	July 1, 2004	Nov. 15, 2004
Review current grading/erosion control ordinances	One Time	September 1, 2003
Identify a new development site and propose study to evaluate the effectiveness of a selected BMP	One Time	Nov. 15, 2003
Review Guidelines for New Development and Redevelopment to determine the need for any revisions	One Time	July 1, 2003
XII.B. WATER QUALITY MANAGEMENT PLAN (WQMP) FOR RUNOFF (FOR NEW DEVELOPMENT/SIGNIFICANT RE-DEVELOMENT): Review existing BMPs for new development and submit revised WQMP for urban runoff from new developments/significant redevelopments	One Time	January 1, 2004
XIII. PUBLIC EDUCATION AND OUTREACH: Public awareness survey to determine effectiveness of current public and business education strategy	One Time	October 30, 2002
Propose a study for measuring changes in the public's knowledge and behavior as a result of the education program	One Time	January 15, 2003
Recommend any changes to the public and business education program	One Time	January 15, 2003
Develop public education material to encourage the public to report illegal dumping from residential, industrial, construction, and commercial sites into public streets, storm drains and other waterbodies	One Time	Sept. 15, 2002

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Develop BMP guidance for household use of fertilizer, pesticides, herbicides, and other chemicals, guidance for mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting	One Time	July 1, 2003
Determine best method of establishing a mechanism(s) for providing educational and General Industrial Permit materials to businesses within jurisdiction	One Time	January 15, 2003
XIV. MUNICIPAL FACILITIES/ACTIVITIES: Complete assessment of flood control facilities to evaluate opportunities to configure and/or reconfigure channel segments to function as pollution control devices and optimize beneficial uses	September 1, 2003	Nov. 15, 2003
Develop list of BMPs for fire-fighting training, non-emegency firefighting activities, etc.	One Time	July 1, 2003
Develop and distribute to all permittees a BMP fact sheet to address public agency activities	October 1, 2002	Nov. 15, 2002
Develop and distribute BMP guidance for public agency, contract field operations and maintenance staff to provide guidance in appropriate pollution control measures, how to respond to spills, etc.	October 1, 2002	Nov. 15, 2002
Evaluation of efficiency and cost effectiveness of the available BMPs for litter control and develop recommendations for any needed improvements	July 1, 2003	Nov. 15, 2003
Identify areas not subject to street sweeping due to lack of continuous curb and gutter and evaluate their potential for impacting storm water quality	One Time	Nov. 15, 2003
Inspect and maintain at least 80% of drainage facilities on an annual basis, with 100% of facilities in a two-year period. Evaluate if inspection and maintenance schedule need to be increased.	Annually	Nov. 15
XVI. PROGRAM MANAGEMENT: Evaluate the management plan to determine need for revisions	By October 1, Annually	Nov. 15
XVII. FISCAL RESOURCES: Prepare and submit a unified fiscal analysis to the EO	Annually	Nov. 15
XIX. PERMIT EXPIRATION AND RENEWAL: **Submit** Report of Waste Discharge	180 days prior to expiration	October 28, 2006

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MONITORING PROGRAM REQUIREMENTS: GIS-based mapping of drainage area information	One Time	July 1, 2003
Assessment of relative pollutant loading from different drainage areas to receiving waters	Dec. 1, 2003, One Time	Nov. 15, 2004
Evaluate effectiveness of selected BMPs in controlling pollutant loads	Dec. 1, 2003, Annually thereafter	Nov. 15, 2004
Submit bacteriological monitoring program	One Time	July 1, 2002
Submit integrated watershed monitoring program	One Time	July 1, 2003
REPORTING: Annual progress report	Annually	Nov. 15

Ordered by_____

Gerard J. Thibeault
Executive Officer
April 26, 2002

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California Regional Water Quality Control Board

Santa Ana Region

3737 Main Street, Suite 500

Riverside, CA 92501- 3348

FACT SHEET

April 26, 2002

ITEM: **13**

SUBJECT: Waste Discharge Requirements for the San Bernardino County Flood Control District (SBCFCD), the County of San Bernardino, and the Incorporated Cities of San Bernardino County within the Santa Ana Region, Storm Water Runoff Management Program, San Bernardino County, Order No. R8-2002-0012 (NPDES No. CAS618036)

I. INTRODUCTION

The 1972 Clean Water Act (CWA) established the National Pollutant Discharge Elimination System (NPDES) permit program to regulate the discharge of pollutants from point sources to waters of the United States (U.S.). Since then, considerable strides have been made in reducing conventional forms of pollution, such as from sewage treatment plants and industrial facilities, through the implementation of the NPDES program and other federal, state and local programs. The adverse effects from some of the persistent toxic pollutants (DDT, PCB, TBT) were addressed through manufacturing and use restrictions and through cleanup of contaminated sites. On the other hand, pollution from land runoff (including atmospheric deposition, urban, suburban and agricultural) was largely unabated until the 1987 CWA amendments. As a result, diffuse sources, including urban storm water runoff, now contribute a larger portion of many kinds of pollutants than the more thoroughly regulated sewage treatment plants and industrial facilities. The 1987 CWA amendments established a framework for regulating urban storm water runoff. Pursuant to these amendments, the Santa Ana Regional Water Quality Control Board (Regional Board) started regulating municipal storm water runoff in 1990.

The attached pages contain information concerning an application for renewal of waste discharge requirements and a National Pollutant Discharge Elimination System (NPDES) permit. Order No. R8-2002-0012, NPDES No. CAS618036, prescribes waste discharge requirements for urban storm water runoff from the cities and the unincorporated areas in San Bernardino County within the jurisdiction of the Santa Ana Regional Board. On September 1, 2000, the San Bernardino County Flood Control District (SBCFCD) and the County of San Bernardino, in cooperation with the cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Rancho Cucamonga, Redlands, Rialto, San Bernardino, Upland, and Yucaipa (hereinafter collectively referred to as permittees or dischargers), submitted NPDES Application No. CAS618036 (Report of Waste Discharge) for reissuance of their area-wide NPDES storm water permit. The permit renewal application was submitted in accordance with the requirements specified in the previous

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NPDES storm water permit (Order No. 96-32, NPDES No. CA 618036), which expired on March 1, 2001. The permit application also follows guidance provided by the staff of the State Water Resources Control Board (State Board) and the Regional Water Quality Control Boards (Regional Boards).

On March 2, 2001, Order No. 96-32, NPDES No. CAS 618036, was administratively extended in accordance with 40 CFR Part 122.6 and Title 23, Division 3, Chapter 9, §2235.4 of the California Code of Regulations.

Order No. R8-2002-0012 regulates discharges of urban storm water from the upper Santa Ana watershed to waters of the U.S., ultimately draining to the Pacific Ocean.

II. REGULATORY BACKGROUND/CLEAN WATER ACT REQUIREMENTS

Urban runoff includes dry and wet weather flows from urbanized areas through a storm water conveyance system. As water flows over streets, parking lots, construction sites, and industrial, commercial, residential, and municipal areas, it can intercept pollutants from these areas and transport them to waters of the U.S. Urban runoff may contain pathogens (bacteria, viruses, protozoa), sediment, trash, fertilizers (nutrients, mostly compounds of nitrogen and phosphorus), oxygen-demanding substances (decaying and/or decomposable matter), pesticides (DDT, chlordane, diazinon, chlorpyrifos) heavy metals (cadmium, copper, chromium, lead, zinc), and petroleum products (oil & grease, PAHs, petroleum hydrocarbons). If not properly managed and controlled, urbanization can change the stream hydrology and increase pollutant loading to receiving waters. As watersheds undergo urbanization, pervious surface area decreases, runoff volume and velocities increase, riparian habitats and wetland habitats decrease, frequency and severity of flooding increase, and pollutant loading increases. Most of these impacts are due to human activities that occur during and/or after urbanization. The pollutants and hydrologic changes can cause declines in aquatic resources, cause toxicity to marine organisms, and impact human health and the environment.

The United States Environmental Protection Agency (U.S. EPA) recognizes urban runoff as the number one source of estuarine pollution in coastal communities[1]. Recent studies[2] conducted in the Southern California area have established a definite link between storm water runoff from urban areas and pollution in nearshore zones. A number of Orange County beaches were closed during the summer of 1999 and 2000 due to microbial contamination. During wet weather or storm conditions, discharges from the San Bernardino County areas may ultimately drain into the Pacific Ocean and can have an impact on Orange County beaches. If not properly controlled, urban runoff could be a significant source of pollutants in waters of the US. Table 1 includes a list of pollutants and their sources in urban runoff and lists some of the adverse impacts these pollutants could have on receiving waters.

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[1] US EPA, 1999, 40CFR Parts 9, 122, 123, 124, National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule, 64FR 68727.

[2] Bay, S., Jones, B. H. and Schiff, K. 1999, Study of the Impact of Storm water Discharge on Santa Monica Bay. Sea Grant Program, University of Southern California; and Haile, R.W., et. al., 1996, An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay.

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Table 1[3]

Pollutants/Impacts of Urbanization

Pollutants	Sources	Effects and Trends
Toxins (e.g., biocides, PCBs, trace metals, heavy metals)	Industrial and municipal wastewaters; runoff from farms, forests, urban areas, and landfills; erosion of contaminated soils and sediments; vessels; atmospheric deposition	Poison and cause disease and reproductive failure; fat-soluble toxins may bioconcentrate, particularly in birds and mammals, and pose human health risks. Inputs into U.S. waters have declined, but remaining inputs and contaminated sediments in urban and industrial areas pose threats to living resources.
Pesticides (DDT, diazinon, chlorpyrifos)	Urban runoff; residential, commercial, industrial, and farm use; agricultural runoff	Legacy pesticides (DDT, chlordane, dieldrin) have been banned; still persists in the environment; some of the other pesticide uses have been curtailed or restricted.
Biostimulants (organic wastes, plant nutrients)	Sewage and industrial wastes; runoff from farms and urban areas; nitrogen from combustion of fossil fuels	Organic wastes overload bottom habitats and deplete oxygen; nutrient inputs stimulate algal blooms (some harmful), which reduce water clarity, cause loss of seagrass and coral reef, and alter food chains supporting fisheries. While organic waste loadings have decreased, nutrient loadings have increased (NRC, 1993a, 2000a).
Petroleum products (oil, grease, petroleum hydrocarbons, PAHs)	Runoff and atmospheric deposition from land activities; shipping and tanker operations; accidental spills; oil gas production activities; natural seepage; PAHs from internal combustion engines	Petroleum hydrocarbons can affect bottom organisms and larvae; spills affect birds, mammals and aquatic life. While oil pollution from ships, accidental spills, and production activities has decreased, diffuse inputs from land-based activities have not (NRC, 1985).
Radioactive isotopes	Atmospheric fallout, industrial and military activities	Bioaccumulation may pose human health risks where contamination is heavy.
Sediments	Erosion from farming, construction activities, forestry, mining, development; river diversions; dredging and mining	Reduce water clarity and change bottom habitats; carry toxins and nutrients; clog fish gills and interfere with respiration in aquatic fauna. Sediment delivery by many rivers has decreased, but sedimentation poses problems in some areas.
Plastics and other debris	Boats, fishing nets, containers, trash, urban runoff	Entangles aquatic life or is ingested; degrades wetlands and habitats. Floatables (from trash) are an aesthetic nuisance and can be a substrate for algae and insect vectors.
Thermal	Cooling water from power plants and industry, urban runoff from impervious surfaces	Kills some temperature-sensitive species; displaces others.
Pathogens (bacteria, protozoa, viruses)	Sewage, urban runoff, livestock, wildlife, and discharges from boats.	Pose health risks to swimmers and consumers of seafood. Sanitation has improved, but standards have been raised (NRC 1999a).
Alien species	Fishery stocking, aquarists	Displace native species, introduce new diseases; growing worldwide problem (NRC 1996).

[3] Adapted from "Marine Pollution in the United States" prepared for the Pew Oceans Commission, 2001.

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The Clean Water Act (CWA) prohibits the discharge of any pollutant to navigable waters from a point source unless an NPDES permit authorizes the discharge. Efforts to improve water quality under the NPDES program traditionally and primarily focused on reducing pollutants in discharges of industrial process wastewater and municipal sewage. The 1987 amendments to the CWA required municipal separate storm sewer systems (MS4s) and industrial facilities, including construction sites, to obtain NPDES permits for storm water runoff from their facilities. On November 16, 1990, the United States Environmental Protection Agency (EPA) promulgated the final Phase I storm water regulations. The storm water regulations are contained in 40 CFR Parts 122, 123 and 124.

The areawide NPDES permit for San Bernardino County areas within the Santa Ana Regional Board's jurisdiction is being considered for renewal in accordance with Section 402 (p) of the CWA and all requirements applicable to an NPDES permit issued under the issuing authority's discretionary authority. The requirements included in this Order are consistent with the CWA, the federal regulations governing urban storm water discharges, the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan), the California Water Code, and the State Board's Plans and Policies.

The Basin Plan is the basis for the Regional Board's regulatory programs. The Plan was developed and is periodically reviewed and updated in accordance with relevant federal and state law and regulation, including the Clean Water Act and the California Water Code. As required, the Basin Plan designates the beneficial uses of the waters of the Region and specifies water quality objectives intended to protect those uses. (Beneficial uses and water quality objectives, together with an antidegradation policy, comprise federal "water quality standards"). The Basin Plan also specifies an implementation plan, which includes certain discharge prohibitions. In general, the Basin Plan makes no distinctions between wet and dry weather conditions in designating beneficial uses and setting water quality objectives, i.e., the beneficial uses, and correspondingly, the water quality objectives are assumed to apply year-round. (Note: In some cases, beneficial uses for certain surface waters are designated as "I", or intermittent, in recognition of the fact that surface flows (and beneficial uses) may be present only during wet weather.) Most beneficial uses and water quality objectives were established in the 1971, 1975 and 1983 Basin Plans.

Water Code Section 13241 requires that certain factors be considered, at a minimum, when water quality objectives are established. These include economics and the need for developing housing in the Region. (The latter factor was added to the Water Code in 1987). During this permit development process, the permittees raised an issue regarding compliance with Section 13241 of the California Water Code with respect to water quality objectives for wet weather conditions, specifically the cost of achieving compliance during wet weather conditions and the need for developing housing within the Region and its impact on urban storm water runoff. During the next review of the Basin Plan, staff will recommend that this matter be incorporated on the triennial review list. In the meantime, the provisions of this Order will result in reasonable further progress towards the attainment of the existing water quality objectives, in accordance with the discretion in the permitting authority recognized by the United States Court of Appeals for the Ninth Circuit in Defenders of Wildlife v Browner, 191 F.3d 1159, 1164 (9th Cir. 1999).

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III. BENEFICIAL USES

Storm water flows which are discharged to municipal storm drain systems in San Bernardino County are tributary to various water bodies (inland surface streams, lakes and reservoirs) of the state. The beneficial uses of these water bodies include municipal and domestic supply, agricultural supply, industrial service and process supply, groundwater recharge, hydropower generation, water contact recreation, non-contact water recreation, and sportfishing, warm freshwater habitat, cold freshwater habitat, preservation of biological habitats of special significance, wildlife habitat and preservation of rare, threatened or endangered species. The ultimate goal of this storm water management program is to protect the beneficial uses of the receiving waters.

IV. PROJECT AREA

The permitted area is delineated by the Santa Ana-Lahontan Regional Board boundary line on the north and northeast, the Santa Ana-Colorado River Basin Regional Board boundary line on the east, the San Bernardino-Riverside County boundary line on the south and southeast, the San Bernardino-Orange County boundary line on the southwest, and the San Bernardino-Los Angeles County boundary line on the west (see Attachment 1). The permittees serve a population of approximately 1.33 million, occupying an area of approximately 985 square miles. The latest figures estimated 384 miles of aboveground and 334 miles of below ground storm drain channels in the project area. Approximately seven percent (7%) of the San Bernardino County surface area drains into water bodies within this Regional Board's jurisdiction. Storm water discharges from urbanized areas consist mainly of surface runoff from residential, commercial and industrial developments. In addition, there are storm water discharges from agricultural land uses, including farming and animal feeding operations. However, the CWA specifically excludes discharges from agricultural sources from regulations under this program. Areas of the County not addressed or which are excluded under the storm water regulations and areas not under the jurisdiction of the permittees are excluded from coverage under this permit. These areas or activities include the following:

- Federal lands and state properties, including, but not limited to, military bases, national forests, hospitals, schools, colleges and universities, and highways;
- Native American tribal lands;
- Open space and rural (non-urbanized) areas;
- Agricultural lands; and
- Utilities and special districts.

Discharges from the project area drain into the Santa Ana River. The watershed regulated under this Order is generally referred to as the Upper Santa Ana River Basin.

V. WATERSHED MANAGEMENT/UPPER SANTA ANA RIVER BASIN

To regulate and control storm water discharges from the San Bernardino County area to the San Bernardino County storm drain systems, an area-wide approach is essential. The entire storm drain system in San Bernardino County is not controlled by a single entity; the SBCFCD, several cities, and the State Department of Transportation

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(Caltrans) manage the system. In addition to the cities and the SBCFCD, there are a number of other significant contributors of urban storm water runoff to these storm drain systems. These include: large institutions, such as the State University system; schools; hospitals; federal facilities, such as military installations; State agencies, such as Caltrans; water and wastewater management agencies, such as San Bernardino Valley Municipal Water District and Inland Empire Utilities Agency; the National Forest Service; and state parks. The management and control of the entire flood control system cannot be effectively carried out without the cooperation and efforts of all these entities. Also, it would not be meaningful to issue a separate storm water permit to each of the entities within the permitted area whose land/facilities drain into the county storm drain systems. The Regional Board has concluded that the best management option for the San Bernardino County area is to issue an area-wide storm water permit. Some of the storm drain systems in the project area discharge into storm drain systems controlled by other entities, such as the County of Riverside, the County of Orange, and the County of Los Angeles.

Cooperation and coordination among all the stakeholders are essential for efficient and economical management of the watershed. It is also critical to manage non-point sources at a level consistent with the management of urban storm water runoff in a watershed in order to successfully prevent or remedy water quality impairment. Regional Board staff will facilitate coordination of monitoring and management programs among the various stakeholders, when necessary.

An integrated watershed management approach is consistent with the Strategic Plan and Initiatives (June 22, 1995) for the State and Regional Boards. A watershed wide approach is also necessary for implementation of the load and waste load allocations to be developed under the TMDL process. The MS4 permittees and all the affected entities should be encouraged to participate in regional or watershed solutions, instead of project-specific and fragmented solutions.

The pollutants in urban runoff originate from a multitude of sources, and effective control of these pollutants requires a cooperative effort of all the stakeholders and many regulatory agencies. Every stage of urbanization should be considered in developing appropriate urban runoff pollution control methodologies. The program's success depends upon consideration of pollution control techniques during planning, construction and post-construction operations. At each stage, appropriate pollution prevention measures, source control measures, and, if necessary, treatment techniques should be considered.

1. SUB-WATERSHEDS AND MAJOR CHALLENGES

The Santa Ana River Watershed in San Bernardino County can be subdivided into the following sub-watersheds:

A. UPPER SANTA ANA RIVER WATERSHED

The Upper Santa Ana River Watershed includes the upper reaches of the Santa Ana River (Reaches 4, 5 and 6) and its tributaries.

1. Reach 4 of the Santa Ana River: Reach 4 of the Santa Ana River is the portion of the River from Mission Boulevard bridge in Riverside to the San Jacinto fault (Bunker Hill Dike) in San Bernardino. There is perennial flow in this reach of the River, mostly from the upstream

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discharges of treated municipal wastewater. Much of this reach is also maintained as a flood control facility. This reach of the River is posted to warn against water contact recreation, due to microbial problems. The wastewater discharges from the sewage treatment plants to this reach of the River are tertiary treated and are not expected to be sources of microbial contamination. This Order requires the permittees to investigate other sources, such as the transient population living along this stretch of the River, wild life, etc., and storm water and dry weather urban runoff to determine the cause of microbial contamination along Reach 4 of the River. Lytle Creek and Cajon Creek are the other major tributaries to this reach of the River.

Other major problems along this reach of the River include the buildup of total dissolved solids (TDS, dissolved salts or minerals) and nitrogen, largely in nitrate form. The buildup of TDS and nitrates can impact downstream beneficial uses, including reclamation. The buildup of TDS and nitrate is mostly due to agricultural uses, including dairies and the application of fertilizers, municipal and industrial wastewater discharges, and reuse and recycling operations. A complex set of programs and policies are included in the Basin Plan to address this problem, including a water supply plan, a wastewater management plan, and a groundwater management plan. Other elements of the Basin Plan include the non-point source program and the storm water program. The Basin Plan identifies the Statewide General Permits and the MS4 permits as the regulatory tools for storm water management in the Basin.

2. Reach 5 of the Santa Ana River: This reach of the River extends from the San Jacinto Fault in San Bernardino to the Seven Oaks Dam. Most of this reach of the River is maintained as a flood control facility and is dry, except during storm flows. Major tributaries to this reach include San Timoteo Creek, City Creek, Plunge Creek, and Warm Creek. These tributaries are usually dry, except for the discharge of treated wastewater from Yucaipa Valley Water District to San Timoteo Creek and from the City of Beaumont to Coopers Creek (a tributary to San Timoteo Creek). These wastewater discharges flow for a short distance and percolate into the ground. No major water quality problems have been identified in this stretch of the River or its tributaries.

3. Reach 6 of the Santa Ana River: This reach includes the River upstream of Seven Oaks Dam. Major tributaries include Bear Creek, Forsee Creek, and Rattlesnake Creek. Flows consist mostly of snowmelt and storm water runoff. Water quality in this reach of the River tends to be very good.

B. CHINO BASIN WATERSHED

The Chino Basin Watershed covers about 405 square miles and lies largely in the southwestern corner of San Bernardino County, and part of western Riverside County. This permit only covers those portions of the watershed

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that are within San Bernardino County under the jurisdiction of this Board. Surface drainage is generally southward, from the San Gabriel Mountains toward the Santa Ana River and Prado Flood Control Basin. Major surface waterbodies in the Chino Basin Watershed include:

- San Antonio Creek
- Chino Creek
- Cucamonga Creek
- Day Creek, and
- Deer Creek

Although it was originally developed as an irrigated agricultural area, and then into dairies, the watershed is being steadily urbanized. The municipalities under this permit in the Chino Basin Watershed include Chino, Chino Hills, Fontana, Montclair, Ontario, Rancho Cucamonga, Rialto, and Upland. The Chino-Corona Agricultural Preserve has the highest concentration of dairy animals in the nation. The ground and surface water quality in the area have been adversely impacted by these dairy operations.

The dairies within the Region are regulated under the Board's General Dairy Permit, Order No. 99-11, NPDES No. CAG018001. The General Dairy Permit allows discharge of storm water from dairies only for storms exceeding a 24-hour 25-year frequency. The area lacks appropriate flood control facilities, and runoff from upstream urbanized areas often inundates some of the dairies in the area, even during light or moderate storm and runoff events. This causes dairy waste containment facilities to fail and overflow into surface drainage facilities. This overflow causes nutrient, TDS, TSS, and microbial problems in the receiving waters. The San Bernardino and Riverside County Flood Control Districts, in cooperation with local municipalities, are coordinating an effort to construct flood control facilities in the area.

Groundwater problems (mostly TDS and nitrate) in the Chino Basin Watershed are being addressed through a comprehensive watershed management plan. As part of this plan, desalters are being developed to pump and treat contaminated groundwater in the southern part of Chino Basin. One desalter has been built, and a second one is being designed. A co-composting facility owned by the Inland Empire Utilities Agency accepts manure from Chino Basin dairies. The co-composting facility is required to distribute the products outside of the Chino Basin Watershed to reduce the re-introduction of TDS and nutrients to this watershed from the land application of the composted product.

C. BIG BEAR LAKE WATERSHED

The Big Bear Lake watershed is located in the San Bernardino Mountains. Major waterbodies in this watershed include:

- Big Bear Lake
- Baldwin Lake (currently a dry lakebed)

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- Stanfield Marsh
- Shay Meadows
- Rathbone (Rathbun) Creek
- Summit Creek
- Grout Creek

Big Bear Lake is a high mountain reservoir occupying a relatively small, east to west oriented basin. The basin supports a large number of recreational activities. Lake recreational activities include fishing, swimming, boating and water skiing. Areas adjacent to the lake are used for camping, skiing, hiking, equestrian trails and other outdoor activities. Water in the Lake is also used for municipal supplies. A number of water quality problems have been identified for the Lake.

The 1998 303(d) list of impaired water bodies (see below) designated the following waterbodies in this sub-watershed as impaired: Big Bear Lake (nutrients, copper, mercury and siltation); Grout Creek (metals and nutrients); Knickerbocker Creek (metals and pathogens); Summit Creek (nutrients); and Rathbone Creek (nutrients and siltation). The problem pollutants have been identified as coming from resource extraction activities, urban runoff, snow skiing activities, construction and land developments, and non-point sources. In conjunction with local stakeholders, work is underway to develop TMDLs for these pollutants. The TMDLs are expected to be complete by 2004/2005.

2. CWA SECTION 303(d) LIST AND TMDLS:

Pursuant to Section 303(b) of the CWA, the 1998 water quality assessment identified a number of water bodies as impaired. These are waterbodies where the designated beneficial uses are not met and the water quality objectives are being violated. The impaired waterbodies in San Bernardino County within the Santa Ana Regional Board's jurisdiction are listed in Table 2 and shown on Attachment 1 of the permit.

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Table 2

CLEAN WATER ACT SECTION 303(D) LISTED WATERBODIES & TMDL SCHEDULE

Waterbody	Hydro Unit	Size Affected	Pollutant Stressor	Source	Priority	TMDL Schedule	Permittees
Big Bear Lake	801.710	2970 acres 2970 acres 2970 acres 2970 acres 2970 acres 2970 acres 2970 acres 2970 acres	Copper Mercury Metals Noxious aquatic plants Nutrients Sedimentation/Siltation	Resource Extraction Resource Extraction Resource Extraction Construction/Land development Construction/Land development Snow Skiing Activities Construction/Land development Snow Skiing Activities	Medium Medium Medium Medium Medium Medium Medium Medium	01/02 – 01/05	City of Big Bear Lake County of San Bernardino
Summit Creek	801.710	1 mile	Nutrients	Construction/Land Development	Medium	01/02 – 01/05	City of Big Bear Lake, County of San Bernardino
Knickerbocker Creek	801.710	2 miles 2 miles	Metal Pathogens	Unknown Non-point Source Unknown Non-point Source	Medium	01/03 – 01/05	City of Big Bear Lake, County of San Bernardino
Grout Creek	801.720	2 miles 2 miles	Metal Nutrients	Unknown Non-point Source Unknown Non-point Source	Medium	01/02 – 0105	City of Big Bear Lake, County of San Bernardino
Rathbone Creek	801.720	2 miles 2 miles	Nutrients Sedimentation/Siltation	Snow Skiing Activities Unknown Non-point Source	Medium	01/02 – 01/05	City of Big Bear Lake, County of San Bernardino
Mountain Home Creek, East Fork	801.700	1 mile	Pathogens	Unknown Non-point Source	Low	01/08 – 01/11	County of San Bernardino
Mountain Home Creek	801.580	4 miles	Pathogens	Unknown Non-point Source	Low	01/08 – 01/11	County of San Bernardino
Mill Creek (Prado Area)	801.250	4 miles	Nutrients Pathogens Suspended Solids	Agriculture, Dairies Dairies Dairies	Medium Medium Medium	01/00 – 01/05 01/00 – 01/05 01/00 – 01/05	Ontario, Rancho Cucamonga, Upland, SBCFCD, County of San Bernardino
Mill Creek, Reach 1	801.580	5 miles	Pathogens	Unknown Non-point Source	Low	01/08 –01/11	Redlands, SBCFCD, County of San Bernardino
Mill Creek, Reach 2	801.580.	8 miles	Pathogens	Unknown Non-point Source	Low	01/08 – 01/11	SBCFCD, County of San Bernardino
Santa Ana River, Reach 4	801.270	12 miles	Pathogens	Non-point Source	Low	01/08 – 01/11	Colton, Rialto, Highland, Grand Terrace, Redlands, City of San Bernardino, SBCFCD, County of San Bernardino
Lytle Creek	801.400	18 miles	Pathogens	Unknown Non-point Source	Low	01/08 – 01/11	City of San Bernardino, SBCFCD, County of San Bernardino
Chino Creek, Reach 1	801.210	2 miles	Nutrients Pathogens	Agriculture Dairies Dairies Urban Runoff/ Storm Sewers	Medium Medium	01/00 – 01/05	Chino, Chino Hills, SBCFCD, County of San Bernardino
Chino Creek, Reach 2	801.210	10 miles	High Coliform Count	Unknown Non-point Source	Low	01/08 – 01/11	Chino, Chino Hills, SBCFCD, County of San Bernardino
Prado Park Lake	801.210	60 acres	Nutrients Pathogens	Non-point Source Non-point Source	Low Low	01/08 – 01/11 01/08 – 01/11	Chino, Chino Hills, County of San Bernardino
Cucamonga Creek, Valley Reach	801.210	13 miles	High Coliform Count	Unknown Non-point Source	Low	01/08 – 01/11	Ontario, Rancho Cucamonga, Upland, SBCFCD, County of San Bernardino

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Federal regulations require that a total maximum daily load (TMDL) be established for each 303(d) listed waterbody for each of the pollutants causing impairment. The TMDL is the total amount of the problem pollutant that can be discharged while water quality standards in the receiving water are attained, i.e., water quality objectives are met and the beneficial uses are protected. It is the sum of the individual wasteload allocations (WLA) for point source inputs, load allocations (LA) for non-point source inputs and natural background, with a margin of safety. The TMDLs are the basis for limitations established in waste discharge requirements. TMDLs are being developed for all pollutants identified in Table 2. However, this permit may be reopened to include TMDL implementation, if other implementation methodologies are not effective.

VI. FIRST AND SECOND TERM PERMITS; STORM WATER POLLUTION CONTROL PROGRAMS/POLICIES

Prior to EPA's promulgation of the final storm water regulations, the counties of Orange, Riverside and San Bernardino requested areawide NPDES permits for storm water runoff. On August 29, 1990, the Regional Board issued Order No. 90-136 to the San Bernardino County permittees (first term permit). In 1996, the Board adopted Order No. 96-32 (second term permit). First and second term permits included the following requirements:

1. Prohibited non-storm water discharges to the MS4s, with certain exceptions.
2. Required the municipalities to develop and implement a drainage area management plan (DAMP) to reduce pollutants in urban storm water runoff to the maximum extent practicable (MEP).
3. Required the discharges from the MS4s to meet water quality standards in receiving waters.
4. Required the municipalities to identify and eliminate illicit connections and illegal discharges to the MS4s.
5. Required the municipalities to establish legal authority to enforce storm water regulations.
6. Required monitoring of dry weather flows, storm flows, and receiving water quality, and required program assessment.

The following programs and policies have been implemented or are being implemented by the permittees. During the first term permit, the permittees developed a Drainage Area Management Plan (1993 DAMP). The 1993 DAMP included a number of best management practices (BMPs) and a very extensive public education program. The monitoring programs for the first and second term permit included 10 monitoring stations within streams and flood control channels. The findings and conclusions from these monitoring stations and monitoring programs of other municipal permittees (Riverside County, Orange County and others) have been used to identify problem areas and to re-evaluate the monitoring program and the effectiveness of the BMPs. The future direction of some of these program elements will depend upon the results of the ongoing studies and a holistic approach to watershed management.

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Other elements of the storm water management program included identification and elimination of illegal discharges and illicit connections and establishment of adequate legal authority to control pollutants in storm water discharges. The permittees have completed a survey of their storm drain systems to identify illegal/illicit connections and have adopted appropriate ordinances to establish legal authority. Some of the more specific achievements during the first and second term permits are as follows:

1. Interagency Agreements and Coordination: Established a program management structure through an interagency Implementation Agreement and established a Management Committee as an overall decision making body with designated representatives from each of the permittees. Participated in regional monitoring programs and focused special studies/research programs. Worked with other local and State agencies to provide a consistent urban storm water pollution control message to the public. Worked with Caltrans, other transportation agencies, the Storm Water Quality Task Force, and others to further study and understand urban runoff problems and control measures.

2. Ordinances, Plans and Policies: Adopted Model Storm Drain Ordinance and Implementation Plan and Model Guidelines for New Development and Redevelopment; developed the Municipal Activities Pollution Prevention Strategy (MAPPS) which contains a complete list of BMPs for corporate yard activities and Criteria for MS4 Inspections.

3. Program Review: A number of existing programs were reviewed to determine their effectiveness in combating urban pollution and to recommend alternatives and/or improvements, including review and revision of CEQA Process and General Plan elements to address storm water quality issues, litter control measures, street sweeping frequencies and methods, public agency activities and facilities, illegal discharges and illicit connections to the MS4 systems, and existing monitoring programs. A public survey was conducted to determine the public's understanding of storm water pollution and prevention, and the effectiveness of the Storm Water Program's campaigns.

4. Public Education: A number of steps were taken to educate the public, businesses, industries, and commercial establishments regarding their role in urban runoff pollution controls. The industrial dischargers were notified of the storm water regulatory requirements. Gas/service stations were targeted and a fact sheet developed with BMP information. Business Recognition Programs were instituted as incentives for storm water management. Fact sheets, brochures, and flyers were developed and distributed to residents. The permittees also participated in radio and television advertisements, presentations at schools and participation in regional events to increase awareness of pollution prevention among the general public. A 24-hour hotline was established for reporting illegal dumping or any violations of the storm water program as well as to provide information regarding the storm water program. A website was completed that highlights the storm drain system and storm water pollution prevention services offered by the San Bernardino County Storm Water Program,

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BMPs, "Adopt-A-Gutter" program, and contacts/links to other related resources.

5. Public Agency Training: Training was provided to public agency employees to implement New Development Guidelines and Public Works BMPs, to conduct investigations of reported water quality problems, and to conduct inspections of industrial facilities and public work projects. The municipal planners were trained to recognize water quality related problems in proposed developments.

6. Related Activities: Modified flood control facilities by channel stabilization, creation of a sediment basin and expansion of an existing basin, eliminated illegal connections and permitted and/or documented illicit connections to the MS4s.

VII. FIRST AND SECOND TERM PERMITS; WATER QUALITY IMPROVEMENTS

An accurate and quantifiable measurement of the impact of the above stated storm water management programs is difficult, due to a variety of reasons, such as the variability in chemical water quality data, the incremental nature of BMP implementation, lack of baseline monitoring data and the existence of some of the programs and policies prior to initiation of formal storm water management programs. There are generally two accepted methodologies for assessing water quality improvements: (1) conventional monitoring such as chemical-specific water quality monitoring; and (2) non-conventional monitoring such as monitoring of the amount of household hazardous waste collected and disposed off at appropriate disposal sites, the amount of used oil collected, the amount of debris removed, etc.

The water quality monitoring data did not indicate any discernible trends or significant changes. However, the non-conventional monitoring data indicate that other programs and policies have been very effective in keeping a significant quantity of wastes from being discharged into waters of the US. It is expected that continuation of these programs and policies will eliminate and/or control pollutants in storm water runoff.

During the second term permit, there was an increased focus on watershed management initiatives and coordination among the municipal permittees in Orange, Riverside and San Bernardino Counties. These efforts resulted in a number of regional monitoring programs and other coordinated program and policy developments.

It is anticipated that with continued implementation of the management plan (ROWD) and other requirements specified in this Order, the goals and objectives of the storm water regulations will be met, including protection of the beneficial uses of all receiving waters.

VIII. FUTURE DIRECTION/2000 ROWD

The NPDES permit renewal application describes the area-wide Storm Water Management Program for the third permit term and it includes programs and policies the permittees are proposing to implement during the third term permit. The 2000 ROWD is the principal guidance document for urban storm water management programs in San Bernardino County and includes the following major components:

1. Provides a framework for the program management activities and municipal storm water management program development.

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2. Provides the legal authority to control discharges to the MS4s.
3. Improves current BMPs to achieve further reduction in pollutant loading to the MS4s.
4. Includes programs and policies to increase public education processes and to seek public support for urban storm water pollution prevention BMPs.
5. Ensures controls for new developments and significant redevelopments.
6. Ensures that construction sites implement appropriate pollution control measures.
7. Ensures that industrial sites are in compliance with storm water regulations.
8. Includes programs and policies to eliminate illegal discharges and illicit connections to the MS4s.
9. Includes continued monitoring of urban runoff.
10. Includes provisions for any special focus studies and/or control measures.

A combination of these programs and policies and the requirements specified in this Order should improve control of pollutants in storm water runoff from storm water conveyance facilities owned and/or controlled by the permittees.

IX. PERMIT REQUIREMENTS

The legislative history of storm water statutes (1987 CWA Amendments), US EPA regulations (40CFR Parts 122, 123, and 124), and clarifications issued by the State Water Resources Control Board (State Board, Orders No. WQ 91-03 and WQ 92-04) indicate that a non-traditional NPDES permitting strategy was anticipated for regulating urban storm water runoff. Due to economic and technical infeasibility of full-scale end-of-pipe treatments and the complexity of urban storm water runoff quality and quantity, MS4 permits generally include narrative requirements for the implementation of BMPs in place of numeric effluent limits.

The requirements included in this Order are meant to specify those management practices, control techniques and system design and engineering methods that will result in maximum extent practicable (MEP) protection of the beneficial uses of the receiving waters. The State Board (Orders No. WQ 98-01 and WQ 99-05) concluded that MS4s must meet the technology-based MEP standard and water quality standards (water quality objectives and beneficial uses). The U. S. Court of Appeals for the Ninth Circuit subsequently held that strict compliance with water quality standards in MS4 permits is at the discretion of the local permitting agency. Any requirements included in the Order that are more stringent than the federal storm water regulations is in accordance with the CWA Section 402(p)(3)(iii), and the California Water Code Section 13377 and are consistent with the Regional Board's interpretation of the requisite MEP standard.

The Report of Waste Discharge (ROWD) included a discussion of the current status of San Bernardino County's urban storm water management program and the proposed programs and policies for the next five years (third term permit). This Order recognizes

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the performance commitments made by the permittees for the third permit term in implementing the storm water regulations. Therefore, this Order is less prescriptive compared to some of the other MS4 NPDES permits for urban runoff issued by other Regional Boards. However, it hopes to achieve the same or better water quality benefits because of the programs and policies already being implemented or proposed for implementation.

The major requirements include: 1) Discharge prohibitions; 2) Receiving water limitations; 3) Adequate legal authority; 4) Prohibition on illicit connections and illegal discharges; 5) Inspection activities by the municipalities; 6) Sewage spills, sanitary sewer line leaks, septic system failures and portable toilet discharges; 7) New development/re-development requirements; 8) Public and business education; 9) Municipal facilities and activities; and 10) Monitoring and reporting requirements.

These programs and policies are intended to improve urban storm water quality and protect the beneficial uses of receiving waters of the region.

1. DISCHARGE PROHIBITIONS

In accordance with CWA Section 402(p)(3)(B)(ii), this Order prohibits the discharge of non-storm water to the MS4s, with a few exceptions. The specified exceptions are consistent with 40 CFR 122.26(d)(2)(iv)(B)(1). If the permittees or the Executive Officer determines that any of the exempted non-storm water discharges contain pollutants, a separate NPDES permit, a separate Waste Discharge Requirement or coverage under the Regional Board's De Minimis permit will be required.

2. RECEIVING WATER LIMITATIONS

Receiving water limitations are included to ensure that discharges from MS4 systems do not cause or contribute to violations of applicable water quality standards in receiving waters. The compliance strategy for receiving water limitations is consistent with the U.S. EPA and State Board guidance and recognizes the complexity of storm water management.

This Order requires the permittees to meet water quality standards in receiving waters in accordance with U.S. EPA requirements, as specified in State Board Order No. WQ 99-05. If water quality standards are not met by implementation of current BMPs, the permittees are required to re-evaluate the programs and policies and to propose additional BMPs. Compliance determination will be based on this iterative BMP implementation/compliance evaluation process.

3. LEGAL AUTHORITY

Each permittee has adopted a number of ordinances, municipal codes, and other regulations to establish legal authority to control discharges to the MS4s and to enforce these regulations as specified in 40 CFR 122.26(d)(2)(I)(B, C, E, and F). The permittees are required to enforce these ordinances and to take enforcement actions against violators (40 CFR 122.26(d)(2)(iv)(A-D).

The enforcement activities undertaken by a majority of the permittees have consisted primarily of Notices of Violation, which act to educate the public on the environmental consequences of illegal discharges. In the case of the County, additional action has sometimes included recovery of investigation and cleanup

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costs from the responsible party. In the event of egregious or repeated violations, the option exists for referral to the County District Attorney for possible prosecution. In order to eliminate unauthorized, non-storm water discharges, reduce the amount of pollutants commingling with storm water runoff and thereby protect water quality, an additional level of enforcement is required between Notices of Violation and referrals to the District Attorney. Therefore, by November 15, 2003, the permittees are required to establish the authority and resources to administer either civil or criminal fines and/or penalties for violations of their local water quality ordinances (and the Federal Clean Water Act). The progress in establishing this program must be fully documented in the annual reports submitted by the permittees and the number, nature and amount of fines and/or penalties levied must be reported, beginning with the 2003/2004 annual report.

4. ILLEGAL DISCHARGES AND ILLICIT CONNECTIONS TO MS4s

The permittees have completed their survey of the MS4 systems and eliminated or permitted all identified illicit connections. The permittees have also established a program to address illegal discharges and a mechanism to respond to spills and leaks and other incidents of discharges to the MS4s. The permittees are required to continue these programs to ensure that the MS4s do not become a source of pollutants in receiving waters.

5. MUNICIPAL INSPECTION PROGRAM

Inspections by the municipalities of construction, industrial, and commercial activities within their jurisdiction are required, in order to control the discharge of pollutants entering the MS4 system. The municipalities are required to inventory companies and sites in the above categories, prioritize those companies and sites with respect to their threat to water quality and their proximity to sensitive receiving waters, and perform regular inspections to ensure compliance with local ordinances. While initial observations of non-compliance may result in educational type of enforcement, repeated non-compliance is expected to result in more disciplinary forms of enforcement, such as monetary penalties, stop work orders, or permit suspension or revocation.

During the second term permit, the permittees focused on identifying industrial and commercial facilities in each permittee's jurisdiction and on developing education and outreach materials. The permittees also developed and implemented a storm water inspection program that utilized existing inspection programs to check for storm water elements. This Order requires the permittees to prioritize these facilities by a specified date, based on threat to water quality, and prescribes a minimum inspection frequency for facilities based on this prioritization scheme.

This Order requires the permittees to continue their inspection programs and enforce local ordinances for storm water violations at all construction sites, including those covered under the Statewide General Construction Permit. This Order further requires the permittees to prioritize these sites by a specified date, based on threat to water quality, and prescribes a minimum inspection frequency for these sites based on this prioritization scheme.

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6. SEWAGE SPILLS, SANITARY SEWER LINE LEAKS, SEPTIC SYSTEM FAILURES AND PORTABLE TOILET DISCHARGES

The permittees are required to determine if exfiltration from leaking sanitary sewer lines, sewage spills from blocked sewer lines, leaks and spills from sewer lines, improper use of portable toilets, and failing septic systems are causing or contributing to urban storm water pollution problems in their jurisdictions. If any of these is determined to be a problem, the permittees are required to develop and implement a plan to address these problems. In certain areas, the permittees may not have any control over sanitary sewer systems. In such cases, the permittees are required to work with the sanitation district for the area to develop acceptable solutions to these problems.

The permittees have already developed a sewage spill response policy and, where appropriate, entered into agreements with the sanitation districts for responding to sewage spills in a timely manner.

The Regional Board may consider issuing a separate Waste Discharge Requirement Order to address sanitary sewer overflows.

7. NEW DEVELOPMENT AND SIGNIFICANT REDEVELOPMENT

During the second term permit, the permittees developed Guidelines for New Development and Redevelopment. The permittees are required to implement these guidelines. Additionally, this Order requires the permittees to work towards the goal of restoring and preserving the natural hydrologic cycles in approving urban developments. To accomplish this goal, the permittees have the option of using a number of methodologies. The permittees/project proponents may propose BMPs based on a watershed approach, establish a storm water pollution prevention fund for such regional solutions, or propose other innovative and proven alternatives to address storm water pollution. If a set of measures acceptable to the Executive Officer is not developed and approved by December 1, 2003, the permittees are required to use the numeric sizing criteria specified in this Order. The numeric criteria are identical to the ones used by the San Diego Regional Board in its MS4 permit for permittees within the San Diego County area (Order No. 2001-01).

8. PUBLIC AND BUSINESS EDUCATION OUTREACH PROGRAM

Public outreach is an important element of the overall urban pollution prevention program. The permittees have committed to implement a strategic and comprehensive public education program to maintain the integrity of the receiving waters and their ability to sustain beneficial uses. The principal permittee has taken the lead role in the outreach programs and has targeted various groups including businesses, industry, developers, utilities, environmental groups, institutions, homeowners, school children, and the general public. The permittees have developed a number of educational materials, have established a storm water pollution prevention hotline, started an advertising and educational campaign, and distribute public education materials at a number of public events. The permittees are required to continue these efforts and to expand public participation and education programs.

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9. MUNICIPAL FACILITIES AND ACTIVITIES

Education of municipal planning, inspection, and maintenance staff is critical to ensure that municipal facilities and activities do not cause or contribute to an exceedance of receiving water quality standards. The second term permit required the permittees to develop and implement a Municipal Activities Pollution Prevention Strategy to address public agency facilities and activities that are not regulated under the State's General Industrial Activities Storm Water Permit. For the third term permit, the permittees are proposing to regroup the program elements into seven groups: (1) Sewage Sytems; (2) Maintenance Areas and Materials Storage Areas; (3) Landscape Maintenance; (4) Storm Drain Systems; (5) Streets and Roads; (6) Municipal Activities Pollution Prevention training; and (7) Training. Performance commitments are included in the ROWD for each of these seven groups. These commitments and other requirements to ensure water quality protection are included in this Order.

10. MONITORING AND REPORTING REQUIREMENTS

During the first and second term permits, the permittees conducted system characterization, BMP evaluation, and storm water discharge, and receiving water monitoring. These early programs focused on identifying pollutants, estimating pollutant loads, tracking compliance with water quality objectives, and identifying sources of pollutants. The San Bernardino County monitoring programs, as well as other monitoring programs nationwide, have shown that there is a high degree of uncertainty in the quality of storm water runoff and that there are significant variations in the quality of urban runoff spatially and temporally. However, most of the monitoring programs to date have indicated that there are a number of pollutants in urban storm water runoff. A definite link between pollutants in urban runoff and beneficial use impairments has been established only in a few cases.

In 2000, the permittees re-evaluated their monitoring program and proposed a revised monitoring program. The overall goal of the proposed Monitoring Program is to provide information in support of effective implementation of the areawide storm water program. The monitoring program goals are to evaluate BMP effectiveness, identify key pollutants of concern and their sources, evaluate impacts from urban runoff sources to local receiving waters, and participate in regional monitoring and research programs.

To accomplish these goals, the monitoring program focuses on the following areas:

1. Characterization and mapping of drainage areas including identification of pollutants of concern;
2. BMP effectiveness studies to evaluate the usefulness of sedimentation basins and other available technologies for storm water pollution prevention;
3. Receiving water monitoring of selected sites for key chemical and physical constituents, focusing on sites upstream and downstream of the urbanized area on the Santa Ana River and Cucamonga Creek;

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4. Additional monitoring to provide bacteriological data in cooperation with Riverside County;
5. Source identification to identify sources of pollutants of concern; and
6. Data analysis using statistical methods.

Historical wet weather monitoring has shown elevated pollutant concentrations at monitoring Sites 2, 3 and 5. Monitoring Site 2 is located 400 feet south of Freeway 60, west of Archibald Avenue, on the east side of Cucamonga Creek Channel, in the City of Ontario. Land use within this drainage area is primarily commercial and industrial. Site No. 3 is located at Hellman Avenue, between Pine Avenue/Schleisman Road and Chino-Corona Road/Chandler Street, 75 feet east of Hellman Avenue bridge on the south side of Cucamonga Creek Channel near the City of Chino on the San Bernardino County/Riverside County line. This site drains the entire Cucamonga Creek, however the area between Site No. 2 and this site is mainly agricultural. Site No. 5 is located in the Hunts Lane access road north of Hospitality Lane, in a manhole located in the asphalt parking lot behind the Souplantation Restaurant in the City of San Bernardino. This site receives flows from predominantly restaurants mixed with businesses. Using wet weather monitoring data from 1994-99, the 2000 ROWD identified Site 5 to have the highest average concentration for BOD, copper, zinc, and TSS while Site 3 has the highest average concentrations for nitrate and phosphorus. First flush data from the 1999-2000 monitoring events showed elevated levels consistent with prior years' data for Sites 2, 3, and 5.

The permittees are required to continue first flush monitoring at storm drain monitoring Sites 2, 3, and 5 and focus source identification and control efforts at these locations pending approval of an integrated watershed monitoring program.

The permittees also participate in a number of other regional monitoring programs, such as the Southern California Coastal Water Research Project's (SCCWRP) Storm Water Monitoring / Research Cooperative Program.

The permittees are encouraged to continue their participation in regional and watershed-wide monitoring programs. By July 1, 2003, the permittees are required to re-evaluate their Water Quality Monitoring Program and submit a revised plan for approval. The revised integrated watershed monitoring program will identify data gaps from previous and other monitoring efforts, aim to attain the above-mentioned objectives and will incorporate statewide requirements for municipal storm water monitoring programs.

X. WATER QUALITY BENEFITS/COST ANALYSIS/FISCAL ANALYSIS

There are direct and indirect benefits from clean beaches, clean water, and clean environment. It is difficult to assign a dollar value to the benefits the public derives from fishable and swimmable waters. In 1972, at the start of the NPDES program, only 1/3 of the U.S. waters were swimmable and fishable. In 2001, 2/3 of the U.S. waters meet these criteria. In the 1995 "*Money*" magazine survey of the "Best Places to Live," clean water and air ranked as the most important factors in choosing a place to live. Thus, environmental quality has a definite link to property values. Clean lakes and beaches and other water recreational facilities also attract tourists.

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The true magnitude of the urban runoff problem is still elusive and any cost estimate for cleaning up urban runoff would be premature short of end-of-pipe treatments. For urban storm water runoff, end-of-pipe treatments are cost prohibitive and are not generally considered as a technologically feasible option. Over the last decade, the permittees have attempted to define the problem and implemented best management practices to combat the problem. The costs incurred by the permittees in implementing these programs and policies are available.

The area-wide program is funded by the permittees. The principal permittee prepares an annual budget for the Management Committee. The principal permittee allocates 95 percent of the approved budget costs to the co-permittees based on percentage calculated using the cost allocation formula defined in the Implementation Agreement. The area-wide program activities include: overall storm water program coordination; intergovernmental agreements; representation at the Storm Water Quality Task Force, Regional Board/State Board meetings and other public forums; preparation and submittal of compliance reports and other reports required under the NPDES permits; responding to Water Code Section 13267 requests; budget and other program documentation; and coordination of consultant studies, co-permittee meetings, and training seminars. For the next permit term, the projected average annual area-wide budget is about $650,000. The overall costs increased from $2.50M in 1996-2001 to $3.25M for the next permit term.

The permittees identified the following budget for Fiscal Year (2001/02):

EXPENDITURE ITEMS	AMOUNT ($)	PERCENTAGE
Annual NPDES Permit Fee	10,000	1.25
Monitoring Program	150,000	18.75
Public Education Program	350,000	43.75
Consultant Costs	50,000	6.25
Administration	170,000	21.25
Participation in Statewide NPDES Issues	40,000	5.00
Contingency	30,000	3.75
Total	800,000	100.00

XI. ANTIDEGRADATION ANALYSIS

The Regional Board has considered whether a complete antidegradation analysis, pursuant to 40 CFR 131.12 and State Board Resolution No. 68-16, is required for the storm water discharges. The Regional Board finds that the pollutant loading rates to the receiving waters will be reduced with the implementation of the requirements in this Order. As a result, the quality of storm water discharges and receiving waters will be improved, thereby improving protection for the beneficial uses of waters of the United States. Since this Order will not result in a lowering of water quality, a complete antidegradation analysis is not necessary, consistent with the federal and state antidegradation requirements.

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XII. PUBLIC WORKSHOPS

The Regional Board recognizes the significance of San Bernardino County's Storm Water/Urban Runoff Management Program and will conduct, participate, and/or assist with any workshop during the term of this permit to promote and discuss the progress of the storm water management program. The first public workshop regarding this draft Order was conducted at the September 26, 2001 Board meeting held at the City Council Chambers of Corona. The second public workshop was conducted at the January 23, 2002 Board meeting, also held at the City Council Chambers of Corona. Persons wishing to be included in the mailing list for any of the items related to this permit may register their name, mailing address and phone number with the Regional Board office at the address given below.

XIII. PUBLIC HEARING

The Regional Board will hold a public hearing regarding the proposed waste discharge requirements at the April 26, 2002 Board meeting to be held at the City Council Chambers of Corona, 815 W. Sixth Street, Corona. Further information regarding the conduct and nature of the public hearing concerning these waste discharge requirements may be obtained by writing or visiting the Santa Ana Regional Board office, 3737 Main Street, Suite 500, Riverside, CA 92501-3339. This and other information are also available at the website at: www.swrcb.ca.gov/rwqcb8.

XIV. INFORMATION AND COPYING

Persons wishing further information may write to the above address or call Mr. Muhammad Bashir at (909) 320-6396. Copies of the application, proposed waste discharge requirements, and other documents (other than those which the Executive Officer maintains as confidential) are available at the Regional Board office for inspection and copying by appointment scheduled between the hours of 10:00 a.m. and 4:00 p.m., Monday through Friday (excluding holidays).

XV. REGISTER OF INTERESTED PERSONS

Any person interested in a particular application or group of applications may leave his/her name, address, and phone number as part of the file for an application. Copies of tentative waste discharge requirements will be mailed to all interested parties.

XVI. RECOMMENDATIONS

Adopt Order No. R8-2002-0012, NPDES No. CAS618036, as presented.

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In addition to the dischargers, comments were solicited from the following agencies and/or persons:

U.S. Environmental Protection Agency - Terry Oda/Eugene Bromley, Permit Issuance Section
U.S. Army District, Los Angeles, Corps of Engineers - Permits Section
NOAA, National Marine Fisheries Service
U.S. Fish and Wildlife Service - Carlsbad
State Water Resources Control Board - Jorge Leon/Elizabeth Miller Jennings, Office of the Chief Counsel
State Water Resources Control Board - Bruce Fujimoto, Division of Water Quality
State Department of Water Resources - Glendale
California Regional Water Quality Control Board, North Coast Region (1) - John Short
California Regional Water Quality Control Board, San Francisco Bay Region (2) - Dale Boyer
California Regional Water Quality Control Board, Central Coast Region (3) - Jennifer Biting
California Regional Water Quality Control Board, Los Angeles Region (4) - Wendy Philips
California Regional Water Quality Control Board, Central Valley Region (5) - George D. Day
California Regional Water Quality Control Board, Central Valley Region (5R), Redding - Carole Crowe
California Regional Water Quality Control Board, Central Valley Region (5F), Fresno - Jarma Bennett
California Regional Water Quality Control Board, Lahonton Region (6SLT), South Lake Tahoe - Mary Fiore-Wagner
California Regional Water Quality Control Board, Lahonton Region (6V), Victorville - Gene Rodash
California Regional Water Quality Control Board, Colorado River Basin Region (7) - Abdi Haile/Pat Garcia
California Regional Water Quality Control Board, San Diego Region (9) - Bob Morris
State Department of Fish and Game - Long Beach
State Department of Health Services - San Bernardino
State Department of Parks and Recreation
South Coast Air Quality Management District, Diamond Bar
Orange County Environmental Management Agency, Environmental Resources Division - Christopher CromptonKaren Ashby Orange County Environmental Management Agency, Department of Public Works, Flood Programs - Herb Nakasone
San Bernardino County Flood Control District - Naresh Varma
Caltrans, District 8, San Bernardino - Paul Lambert
Southern Pacific Railroad
Atchison, Topeka & Santa Fe Railway Company
U.S. Department of the Air Force, March Air Force Base
Camp Dresser and McKee - Jeff Endicott
Building Industry Association - Tim Piasky
L.A. County Department of Public Works - Mustafa Ariki

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U.S. Department of Agriculture - Forest Services, San Bernardino County National Forest

Environmental Organizations
Sierra Club, San Gorgonio Chapter
Natural Resources Defense Council (NRDC) - David Beckman/Heather Hoecherl
Tri-County Conservation League - Press Enterprise - Gary Polakovic
Santa Ana Watershed Project Authority - Joseph Grindstaff
Orange County Water District - Bill Mills
Metropolitan Water District - George Muse
Western Municipal Water District - Don Harriger
San Bernardino Valley Municipal Water District
Southern California Association of Governments, Los Angeles
Inland Empire West Resource Conservation District - General Manager
Big Bear Municipal Water District - General Manager
Inland Empire Utilities Agency - General Manager
Cucamonga County Water District - General Manager
East Valley Water District - General Manager
Monte Vista Water District - General Manager
West San Bernardino County Water District - Butch Araiz
Yucaipa Valley Water District - General Manager

Hospitals (Administrator)
Bear Valley Community Hospital
Chino Community Hospital
Doctors Hospital
Kaiser Foundation Hospital
Loma Linda Community Hospital
Loma Linda University Medical Center
Mountains Community Hospital
Ontario Community Hospital
Patton State Hospital
U.S. Department of Veterans Affairs - Memorial Veterans Medical Center
Redlands Community Hospital
St. Bernardine Medical Center
San Antonio Community Hospital
San Bernardino Community Hospital
San Bernardino County Hospital

Universities and Colleges (Chancellor)
California State University - California State University San Bernardino
San Bernardino Community College District - Chaffey College Campus
San Bernardino Community College District - Crafton Hills College Campus
San Bernardino Community College District - San Bernardino Valley College Campus
University of Redlands
Loma Linda University

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School Districts (Superintendent)
Alta Loma Elementary School District
Bear Valley Unified School District
Central Elementary School District
Chaffey Joint Union High School District
Chino Unified School District
Colton Joint Unified School District
Cucamonga Elementary School District
Etiwanda Elementary School District
Fontana Unified School District
Mountain View Elementary School District
Mt. Baldy Joint Elementary School District
Ontario-Montclair Elementary School District
Rialto Unified School District
Rim of the World Unified School District
Redlands Unified School District
San Bernardino City Unified School District
Upland Unified School District
Yucaipa Joint Unified School District

Permittees
City of Big Bear Lake - Brian Gengler
City of Chino - David Crosley
City of Chino Hills - John Mura
City of Colton - Kathy Kivley
City of Fontana - Curtis Aaron
City of Grand Terrace - John Donlevey
City of Highland - Larry Williams
City of Loma Linda - Dennis Barton
City of Montclair - Mario Orioli
City of Ontario - Glen Stott
City of Rancho Cucamonga - Bob Zetterberg
City of Redlands - Tom Fujiwara
City of Rialto - Bruce Cluff
City of San Bernardino - Michael Grubbs
City of Upland - Steve Gapuzan
City of Yucaipa - Fred Hawkins
San Bernardino County Transportation/Flood Control Department - Naresh Varma
San Bernardino County - Jim Squire

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EXHIBIT C

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

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The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

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pollutants to the maximum extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

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[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

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The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

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II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

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Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers '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 . . . determines appropriate for the control of such pollutants'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

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[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

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that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

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must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

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water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

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[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

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true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

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of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

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Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

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its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

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Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

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employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

[26] Permit at F.1.b(2)(a)(x).

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pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

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[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

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III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

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1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Clerk to the Board

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Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
GENERAL PERMIT FOR
STORM WATER DISCHARGES
ASSOCIATED WITH CONSTRUCTION AND LAND DISTURBANCE
ACTIVITIES

ORDER NO. 2009-0009-DWQ
NPDES NO. **CAS000002**

This Order was adopted by the State Water Resources Control Board on:	**September 2, 2009**
This Order shall become effective on:	**July 1, 2010**
This Order shall expire on:	**September 2, 2014**

IT IS HEREBY ORDERED, that this Order supersedes Order No. 99-08-DWQ except for enforcement purposes. The Discharger shall comply with the requirements in this Order to meet the provisions contained in Division 7 of the California Water Code (commencing with section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act and regulations and guidelines adopted thereunder.

I, Jeanine Townsend, Clerk to the Board, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the State Water Resources Control Board, on September 2, 2009.

AYE: Vice Chair Frances Spivy-Weber
Board Member Arthur G. Baggett, Jr.
Board Member Tam M. Doduc

NAY: Chairman Charles R. Hoppin

ABSENT: None

ABSTAIN: None

Jeanine Townsend
Clerk to the Board

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Order

STATE WATER RESOURCES CONTROL BOARD
ORDER NO. 2009-0009-DWQ
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
GENERAL PERMIT NO. CAS000002

WASTE DISCHARGE REQUIREMENTS
FOR
DISCHARGES OF STORM WATER RUNOFF ASSOCIATED WITH CONSTRUCTION AND LAND DISTURBANCE ACTIVITIES

I. FINDINGS

A. General Findings

The State Water Resources Control Board (State Water Board) finds that:

1. The federal Clean Water Act (CWA) prohibits certain discharges of storm water containing pollutants except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit (Title 33 United States Code (U.S.C.) §§ 1311 and 1342(p); also referred to as Clean Water Act (CWA) §§ 301 and 402(p)). The U.S. Environmental Protection Agency (U.S. EPA) promulgates federal regulations to implement the CWA's mandate to control pollutants in storm water runoff discharges. (Title 40 Code of Federal Regulations (C.F.R.) Parts 122, 123, and 124). The federal statutes and regulations require discharges to surface waters comprised of storm water associated with construction activity, including demolition, clearing, grading, and excavation, and other land disturbance activities (except operations that result in disturbance of less than one acre of total land area and which are not part of a larger common plan of development or sale), to obtain coverage under an NPDES permit. The NPDES permit must require implementation of Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to reduce or eliminate pollutants in storm water runoff. The NPDES permit must also include additional requirements necessary to implement applicable water quality standards.

2. This General Permit authorizes discharges of storm water associated with construction activity so long as the dischargers comply with all requirements, provisions, limitations and prohibitions in the permit. In addition, this General Permit regulates the discharges of storm water associated with construction activities from all Linear Underground/Overhead Projects resulting in the disturbance of greater than or equal to one acre (Attachment A).

3. This General Permit regulates discharges of pollutants in storm water associated with construction activity (storm water discharges) to waters of the United States from construction sites that disturb one or more acres of land surface, or that are part of a common plan of development or sale that disturbs more than one acre of land surface.

4. This General Permit does not preempt or supersede the authority of local storm water management agencies to prohibit, restrict, or control storm water discharges to municipal separate storm sewer systems or other watercourses within their jurisdictions.

5. This action to adopt a general NPDES permit is exempt from the provisions of Chapter 3 of the California Environmental Quality Act (CEQA) (Public Resources Code Section 21100, et seq.), pursuant to Section 13389 of the California Water Code.

6. Pursuant to 40 C.F.R. § 131.12 and State Water Board Resolution No. 68-16,[1] which incorporates the requirements of § 131.12 where applicable, the State Water Board finds that discharges in compliance with this General Permit will not result in the lowering of water quality standards, and are therefore consistent with those provisions. Compliance with this General Permit will result in improvements in water quality.

7. This General Permit serves as an NPDES permit in compliance with CWA § 402 and will take effect on July 1, 2010 by the State Water Board provided the Regional Administrator of the U.S. EPA has no objection. If the U.S. EPA Regional Administrator objects to its issuance, the General Permit will not become effective until such objection is withdrawn.

8. Following adoption and upon the effective date of this General Permit, the Regional Water Quality Control Boards (Regional Water Boards) shall enforce the provisions herein.

9. Regional Water Boards establish water quality standards in Basin Plans. The State Water Board establishes water quality standards in various statewide plans, including the California Ocean Plan. U.S. EPA establishes water quality standards in the National Toxic Rule (NTR) and the California Toxic Rule (CTR).

[1] Resolution No. 68-16 generally requires that existing water quality be maintained unless degradation is justified based on specific findings.

STATE WATER RESOURCES CONTROL BOARD (STATE WATER BOARD)
WATER QUALITY ORDER NO. 97-03-DWQ
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
GENERAL PERMIT NO. CAS000001 (GENERAL PERMIT)

WASTE DISCHARGE REQUIREMENTS (WDRS)
FOR
DISCHARGES OF STORM WATER ASSOCIATED WITH INDUSTRIAL ACTIVITIES
EXCLUDING CONSTRUCTION ACTIVITIES

The State Water Board finds that:

1. Federal regulations for storm water discharges were issued by the U.S. Environmental Protection Agency (U.S. EPA) on November 16, 1990 (40 Code of Federal Regulations [CFR] Parts 122, 123, and 124). The regulations require operators of specific categories of facilities where discharges of storm water associated with industrial activity (storm water) occur to obtain an NPDES permit and to implement Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm discharges.

2. This General Permit shall regulate storm water discharges and authorized non-storm water discharges from specific categories of industrial facilities identified in Attachment 1, storm water discharges and authorized non-storm water discharges from facilities as designated by the Regional Water Quality Control Boards (Regional Water Boards), and storm water discharges and authorized non-storm water discharges from other facilities seeking General Permit coverage. This General Permit may also regulate storm water discharges and authorized non-storm water discharges from facilities as required by U.S. EPA regulations. This General Permit shall regulate storm water discharges and authorized non-storm water discharges previously regulated by San Francisco Bay Regional Water Board Order, No.92-11 (as amended by Order No. 92-116). This General Permit excludes storm water discharges and non-storm water discharges that are regulated by other individual or general NPDES permits, storm water discharges and non-storm water discharges from construction activities, and storm water discharges and non-storm water discharges excluded by the Regional Water Boards for coverage by this General Permit. Attachment 2 contains the addresses and telephone numbers of each Regional Water Board office.

3. To obtain coverage for storm water discharges and authorized non-storm water discharges pursuant to this General Permit, operators of facilities (facility operators) must submit a Notice of Intent (NOI), in accordance with the Attachment 3

instructions, and appropriate annual fee to the State Water Board. This includes facility operators that have participated in U.S. EPA's group application process.

4. This General Permit does not preempt or supersede the authority of local agencies to prohibit, restrict, or control storm water discharges and authorized non-storm water discharges to storm drain systems or other water-courses within their jurisdictions as allowed by State and Federal law.

5. If an individual NPDES permit is issued to a facility operator otherwise subject to this General Permit or an alternative NPDES general permit is subsequently adopted which covers storm water discharges and/or authorized non-storm water discharges regulated by this General Permit, the applicability of this General Permit to such discharges is automatically terminated on the effective date of the individual NPDES permit or the date of approval for coverage under the subsequent NPDES general permit.

6. Effluent limitations and toxic and effluent standards established in Sections 208(b), 301, 302, 303(d), 304, 306, 307, and 403 of the Federal Clean Water Act (CWA), as amended, are applicable to storm water discharges and authorized non-storm water discharges regulated by this General Permit.

7. This action to adopt an NPDES general permit is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21100, et seq.) in accordance with Section 13389 of the California Water Code.

8. Federal regulations (40 CFR Subchapter N) establish effluent limitations guidelines for storm water discharges from some facilities in ten industrial categories.

9. For facilities which do not have established effluent limitation guidelines for storm water discharges in 40 CFR Subchapter N, it is not feasible at this time to establish numeric effluent limitations. This is due to the large number of discharges and the complex nature of storm water discharges. This is also consistent with the U.S. EPA's August 1, 1996 "Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water Permits."

10. Facility operators are required to comply with the terms and conditions of this General Permit. Compliance with the terms and conditions of this General Permit constitutes compliance with BAT/BCT requirements and with requirements to achieve water quality standards. This includes the development and implementation of an effective Storm Water

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Pollution Prevention Plan (SWPPP) to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges.

11. Best Management Practices (BMPs) to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges are appropriate where numeric effluent limitations are infeasible, and the implementation of BMPs is adequate to achieve compliance with BAT/BCT and with water quality standards.

12. The State Water Board has adopted a Watershed Management Initiative that encourages watershed management throughout the State. This General Permit recognizes the Watershed Management Initiative by supporting the development of watershed monitoring programs authorized by the Regional Water Boards.

13. Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions.

14. Following public notice in accordance with State and Federal laws and regulations, the State Water Board held a public hearing on November 12, 1996 and heard and considered all comments pertaining to this General Permit. A response to all significant comments has been prepared and is available for public review.

15. This Order is an NPDES General Permit in compliance with Section 402 of the CWA and shall take effect upon adoption by the State Water Board.

16. All terms that are defined in the CWA, U.S. EPA storm water regulations and the Porter-Cologne Water Quality Control Act will have the same definition in this General Permit unless otherwise stated.

IT IS HEREBY ORDERED that all facility operators required to be regulated by this General Permit shall comply with the following:

A. DISCHARGE PROHIBITIONS:

1. Except as allowed in Special Conditions (D.1.) of this General Permit, materials other than storm water (non-storm water discharges) that discharge either directly or indirectly to waters of the United States are prohibited. Prohibited non-storm water discharges must be either eliminated or permitted by a separate NPDES permit.

2. Storm water discharges and authorized non-storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.

B. EFFLUENT LIMITATIONS:

1. Storm water discharges from facilities subject to storm water effluent limitation guidelines in Federal regulations (40 CFR Subchapter N) shall not exceed the specified effluent limitations.

2. Storm water discharges and authorized non-storm water discharges regulated by this General Permit shall not contain a hazardous substance equal to or in excess of a reportable quantity listed in 40 CFR Part 117 and/or 40 CFR Part 302.

3. Facility operators covered by this General Permit must reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges through implementation of BAT for toxic and non-conventional pollutants and BCT for conventional pollutants. Development and implementation of an SWPPP that complies with the requirements in Section A of the General Permit and that includes BMPs that achieve BAT/BCT constitutes compliance with this requirement.

C. RECEIVING WATER LIMITATIONS:

1. Storm water discharges and authorized non-storm water discharges to any surface or ground water shall not adversely impact human health or the environment.

2. Storm water discharges and authorized non-storm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Board's Basin Plan.

3. A facility operator will not be in violation of Receiving Water Limitation C.2. as long as the facility operator has implemented BMPs that achieve BAT/BCT and the following procedure is followed:

a. The facility operator shall submit a report to the appropriate Regional Water Board that describes the BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality

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EXHIBIT D

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California Regional Water Quality Control Board
Santa Ana Region

RESOLUTION NO. R8-2006-0023

Resolution Amending the Water Quality Control Plan for the Santa Ana River Basin to Incorporate a Nutrient Total Maximum Daily Load (TMDL) for Dry Hydrological Conditions for Big Bear Lake

WHEREAS, the California Regional Water Quality Control Board, Santa Ana Region (hereinafter, Regional Board), finds that:

1. An updated Water Quality Control Plan for the Santa Ana River Basin (Basin Plan) was adopted by the Regional Board on March 11, 1994, approved by the State Water Resources Control Board (SWRCB) on July 21, 1994, and approved by the Office of Administrative Law (OAL) on January 24, 1995.

2. The Basin Plan specifies the following beneficial uses for Big Bear Lake: cold freshwater habitat (COLD), warm freshwater habitat (WARM), water contact recreation (REC1), non-contact water recreation (REC2), wildlife habitat (WILD), municipal and domestic supply (MUN), agricultural supply (AGR), rare, threatened or endangered species (RARE) and groundwater recharge (GWR).

3. For COLD designated inland surface waters, the Basin Plan specifies the narrative objective that dissolved oxygen levels shall not be depressed below 6 mg/L. For WARM designated inland surface waters, the Basin Plan specifies the narrative objective that dissolved oxygen levels shall not be depressed below 5 mg/L.

4. The narrative objectives pertaining to dissolved oxygen are not being met consistently in Big Bear Lake, as demonstrated by relevant monitoring.

5. The Basin Plan specifies numeric total phosphorus and total inorganic nitrogen water quality objectives for Big Bear Lake. These water quality objectives were based on ambient concentrations of total phosphorus and total inorganic nitrogen as determined in the 1970s. Evidence now indicates that these objectives are not sufficiently stringent to protect beneficial uses and should be revised. Relevant monitoring demonstrates that these objectives are not consistently met in Big Bear Lake.

6. Proliferation of nuisance aquatic plants has been recorded in Big Bear Lake since the 1970s. Nutrient discharges have promoted the growth of aquatic plants. These nuisance aquatic plants serve as both a sink and a source of nutrients.

7. Big Bear Lake's designated beneficial uses adversely impacted by nuisance aquatic plants and low dissolved oxygen levels include COLD, WARM, WILD, REC1, REC2 and RARE.

8. As a result of the beneficial use impacts to Big Bear Lake, the Regional Board listed Big Bear Lake as water quality limited in accordance with Section 303(d) of the Clean Water Act. Section 303(d) requires the establishment of a Total Maximum Daily Load (TMDL) for the pollutant(s) causing the impairment. Phosphorus is the principal nutrient causing the impairment. Section 303(d) also requires the allocation of the TMDL among the sources of nutrient inputs. State law requires an implementation plan and schedule to ensure that the TMDL is met and that compliance with water quality standards is achieved.

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9. The Basin Plan amendment shown in the attachment to this Resolution was developed in accordance with Clean Water Act Section 303(d) and Water Code Section 13240 *et seq*. The amendment is proposed for incorporation into Chapter 5 "Implementation", of the Basin Plan. The proposed Basin Plan amendment includes background information concerning the water quality impairment being addressed and the sources of nutrients to Big Bear Lake. The proposed TMDL is supported by a detailed report prepared by Regional Board staff and titled "Staff Report on the Nutrient Total Maximum Daily Loads for Big Bear Lake", June 2005 (hereinafter, "TMDL Report").

10. The Basin Plan amendment specifies a numeric target for total phosphorus. Control of phosphorus is one of the potential methods to ensure compliance with relevant numeric and narrative water quality objectives specified in the Basin Plan, and to prevent adverse beneficial use impacts resulting from the proliferation of nuisance aquatic plants. There is evidence that nitrogen is the limiting nutrient under certain circumstances and that control of nitrogen inputs may be an additional method to address beneficial use impairment in Big Bear Lake. However, due to data and analytical model limitations, it is infeasible to identify an appropriate and achievable nitrogen TMDL, targets and wasteload and load allocations at this time. The Basin Plan amendment requires the collection and evaluation of nitrogen data that will support future revision of the TMDL, if and as necessary.

11. The Basin Plan amendment specifies response numeric targets for chlorophyll a, macrophyte coverage and percentage of nuisance aquatic vascular plant species for Big Bear Lake. These response numeric targets provide a method to track improvements in water quality resulting from reductions in the loading of phosphorus.

12. The numeric targets apply to all hydrological conditions.

13. The Basin Plan amendment specifies a TMDL, wasteload allocations for point source discharges (WLAs), load allocations for nonpoint source discharges (LAs) for total phosphorus for Big Bear Lake for Dry Hydrological Conditions only.

14. The TMDL for Dry Hydrological Conditions specifies a reduction in phosphorus from internal nutrient sources, which are lake sediment and macrophytes. External load dischargers are responsible for reducing their contributions to the internal nutrient loads.

15. The TMDL for Dry Hydrological Conditions does not specify nutrient reductions from external watershed sources, which include resorts, urban discharges and open space/forested lands.

16. The Basin Plan amendment specifies an implementation plan for nutrient reduction. The implementation plan includes compliance schedules for the numeric targets, TMDL, wasteload allocations and load allocations, as well as a monitoring program to track progress toward compliance.

17. The Implementation Plan specifies a requirement for the development of TMDLs, WLAs, and LAs for wet and/or average hydrological conditions once sufficient data are obtained.

18. Given the complex nature of Big Bear Lake, the Implementation Plan specifies the development of a Lake Management Plan that will address competing uses, nutrient reduction strategies and other plans to control nutrient discharges and aquatic plants as appropriate.

19. The Basin Plan amendment will assure the reasonable protection of the beneficial uses of surface waters within the Region and is consistent with the state's antidegradation policy (SWRCB Resolution No. 68-16).

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20. The Regional Board has considered the costs associated with implementation of this amendment, as well as costs resulting from failure to implement nutrient control measures necessary to prevent adverse effects on beneficial uses. The implementation plan in the Basin Plan, which includes extended compliance schedules and employs a phased TMDL approach to provide for refinement based on additional studies and analyses, will ensure that implementation expenditures are reasonable and fairly apportioned among dischargers.

21. Review of the potential environmental impacts of the adoption and implementation of the Big Bear Lake Nutrient TMDL was conducted. The adoption of the TMDL would have no direct effect on the environment. The implementation of projects that may be conducted to implement the Nutrient TMDL is expected to have less than significant impacts or less than significant impacts with application of mitigation measures on the following: air quality, biological resources, hazards and hazardous materials, hydrology and water quality, noise, aesthetics and transportation and traffic. As projects to implement the TMDL are developed, specific environmental impacts and mitigation measures to address those impacts are subject to thorough and separate evaluation pursuant to the California Environmental Quality Act (CEQA).

22. Provided that appropriate mitigation is implemented, projects designed and conducted to achieve the TMDL are expected to have less than significant impact, either individually or cumulatively, on fish and/or wildlife species.

23. The adoption of this TMDL is necessary to reduce loadings of nutrients to Big Bear Lake and to address water quality impairments that arise therefrom.

24. The proposed amendment meets the "Necessity" standard of the Administrative Procedure Act, Government Code, Section 11352, subdivision (b).

25. The Regional Board submitted the relevant technical documents that serve as the basis for the proposed amendment to an external scientific review panel and has considered the comments and recommendations of that panel in drafting the amendment.

26. The proposed amendment will result in revisions to the Basin Plan Chapter 5 "Implementation".

27. The Regional Board discussed this matter at a workshop conducted on August 26, 2005 after notice was given to all interested persons in accordance with Section 13244 of the California Water Code. Based on the discussion at those workshops, the Board directed staff to prepare the appropriate Basin Plan amendment and related documentation to incorporate the Big Bear Lake Nutrient TMDL.

28. The Regional Board prepared and distributed written reports (staff reports) regarding adoption of the Basin Plan amendment in accordance with applicable state and federal environmental regulations (California Code of Regulations, Section 3775, Title 23, and 40 CFR Parts 25 and 131).

29. The process of basin planning has been certified by the Secretary for Resources as exempt from the requirement of the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) to prepare an Environmental Impact Report or Negative Declaration. The Basin Plan amendment package includes staff reports, an Environmental Checklist, an assessment of the potential environmental impacts of the Basin Plan amendment, and a discussion of alternatives. The Basin Plan amendment, Environmental Checklist, staff reports, and supporting documentation are functionally equivalent to an Environmental Impact Report or Negative Declaration.

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30. On April 21, 2006, the Regional Board held a Public Hearing to consider the Basin Plan amendment. Notice of the Public Hearing was given to all interested persons and published in accordance with Water Code Section 13244.

31. The Basin Plan amendment must be submitted for review and approval by the State Water Resources Control Board (SWRCB), Office of Administrative Law (OAL) and U.S. Environmental Protection Agency (USEPA). Once approved by the SWRCB, the amendment is submitted to OAL and USEPA. The Basin Plan amendment will become effective upon approval by OAL. A Notice of Decision will be filed.

32. The Notice of Filing, the TMDL Report, environmental checklist, and the draft amendment were prepared and distributed to interested individuals and public agencies for review and comment, in accordance with state and federal regulations (23 CCR §3775, 40 CFR 25 and 40 CFR 131).

33. For the purposes of specifying compliance schedules in NPDES permits for effluent limitations necessary to implement this TMDL, the schedule(s) specified in this TMDL shall govern, notwithstanding other compliance schedule authorization language in the Basin Plan.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The Regional Board adopts the amendment to the Water Quality Control Plan for the Santa Ana River Basin (Region 8), as set forth in the attachment.

2. The Executive Officer is directed to forward copies of the Basin Plan amendment to the SWRCB in accordance with the requirements of Section §13245 of the California Water Code.

3. The Regional Board requests that the SWRCB approve the Basin Plan amendment, in accordance with Sections §13245 and §13246 of the California Water Code, and forward it to the OAL and U.S. EPA for approval.

4. If, during its approval process, Regional Board staff, SWRCB or OAL determines that minor, non-substantive corrections to the language of the amendment are needed for clarity or consistency, the Executive Officer may make such changes, and shall inform the Board of any such changes.

5. The Executive Officer is authorized to sign a Certificate of Fee Exemption in lieu of payment of the California Department of Fish and Game filing fee.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Santa Ana Region, on April 21, 2006.

Gerard J. Thibeault
Executive Officer

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ATTACHMENT TO RESOLUTION NO. R8-2006-0023

(NOTE: The following language will be inserted into Chapter 5 of the Basin Plan. Corresponding changes will be made to the Table of Contents, the List of Tables, page numbers, and page headers in the plan. Due to ongoing revisions of the Basin Plan layout, the location of tables in relation to text may change during final formatting of the amendments. For formatting purposes, the maps may be redrawn for inclusion in the Basin Plan, and the final layout may differ from that of the draft.)

Chapter 5 - Implementation Plan, Page 5-42

Big Bear Lake

Big Bear Lake, located in the San Bernardino Mountains, was created by the construction of the Bear Valley Dam in 1884. The Lake has a surface area of approximately 3,000 acres, a storage capacity of 73,320 acre-ft and an average depth of 24 feet. The lake reaches its deepest point of 72 feet at the dam. The Big Bear Lake drainage basin encompasses 37 square miles and includes more than 10 streams. Local stream runoff and precipitation on the Lake are the sole source of water supply to the Lake. The spillway altitude is 6,743.2 feet. The major inflows to the lake are creeks, including Rathbone (Rathbun) Creek, Summit Creek, and Grout Creek. Outflow from the Lake is to Bear Creek, which is tributary to the Santa Ana River at about the 4,000-foot elevation level. Twelve percent of Big Bear Lake's drainage basin consists of the Lake itself. The US Forest Service is the largest landowner in the Big Bear area. Two ski resorts, Bear Mountain and Snow Summit, lease land from the Forest Service.

The beneficial uses of Big Bear Lake include cold freshwater habitat (COLD), warm freshwater habitat (WARM), water contact recreation (REC1), non-contact water recreation (REC2), municipal and domestic supply (MUN), agriculture supply (AGR), groundwater recharge (GWR), wildlife habitat (WILD) and rare, threatened or endangered species (RARE).

Big Bear Lake is moderately eutrophic. During the summer months, deeper water may exhibit severe oxygen deficits. Nutrient enrichment has resulted in the growth of aquatic plants, which has impaired the fishing, boating, and swimming uses of the lake. To control this vegetation, mechanical harvesters are used to remove aquatic plants, including the roots.

Toxics may be entering the Big Bear Lake watershed and accumulating in aquatic organisms and bottom sediments at concentrations that are of concern, not only for the protection of aquatic organisms, but for the protection of human health as well. Past Toxic Substances Monitoring Program data have indicated the presence of copper, lindane, mercury, zinc, and PCBs in fish tissue.

During 1992-93, the Regional Board conducted a Phase I Clean Lakes study (Section 314 of the Clean Water Act) to evaluate the current water quality condition of the lake and its major tributaries [Ref. 20]. The focus of the study was to identify the tributaries responsible for inputs of toxics and nutrients. As a result of data collected in the Clean Lakes Study, Big Bear Lake and specific tributaries were placed on the 1994 Clean Water Act Section 303(d) List of Water Quality Limited Segments for the reasons indicated in Table 5-9a-b.

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Table 5-9a-b

Big Bear Lake Watershed Waterbodies on the
1994 303(d) List of Impaired Waters

WATERBODY	STRESSOR
Big Bear Lake	nutrients
	noxious aquatic plants
	sedimentation/siltation
	metals
	copper
	mercury
Rathbone (Rathbun) Creek	nutrients
	sedimentation/siltation
Grout Creek	metals
	nutrients
Summit Creek	nutrients
Knickerbocker Creek	metals
	pathogens

In 2000, the Regional Board convened a TMDL workgroup to assist in the development of Total Maximum Daily Loads for the Big Bear Lake watershed. The Big Bear Municipal Water District, a key contributor to the workgroup, created the Big Bear Lake TMDL Task Force, including representatives of the District, Regional Board staff, the San Bernardino County Flood Control District, the City of Big Bear Lake, the Big Bear Area Regional Wastewater Authority, the State of California, Department of Transportation (Caltrans), the US Forest Service and the Big Bear Mountain Resorts. Initial TMDL development efforts were focused on nutrients, leading to Regional Board adoption of a nutrient TMDL for dry hydrological conditions for Big Bear Lake in 2006. Nutrient TMDLs for wet and/or average hydrological conditions will be incorporated in the Basin Plan when these TMDLs are developed in the future. As shown in Table 5-9a-f, the development of these TMDLs is a requirement of the adopted TMDL implementation plan for the nutrient TMDL for dry hydrological conditions.

1. Big Bear Lake Nutrient Total Maximum Daily Loads (TMDLs)

Past studies, starting in 1968/1969, have shown that Big Bear Lake is moderately eutrophic and that the limiting nutrient is generally phosphorus. In Big Bear Lake, nutrients (nitrogen and phosphorus) are available in the water column and sediment and are taken up by aquatic macrophytes and algae. Nutrients are also bound in living and dead organic material, primarily macrophytes and algae. Decomposition of this organic material, as well as macrophyte and algal respiration, consumes dissolved oxygen, resulting in the depletion of dissolved oxygen from the water column. Oxygen depletion in the hypolimnion results in anoxic conditions, leading to periodic fish kills in Big Bear Lake. Oxygen depletion also results in the release of nutrients from the sediment into the water column, promoting more algae and aquatic macrophyte production. Nutrients released by plant decomposition are cycled back into a bioavailable form.

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Although aquatic macrophytes provide protection from shoreline erosion, habitat for fish and other aquatic biota and waterfowl habitat, excessive growth of noxious and nuisance species, particularly Eurasian watermilfoil (*Myriophyllum spicatum*) impairs recreational uses of the Lake and reduces plant and animal species and habitat diversity.

As stated above, development of nutrient TMDLs to address these problems was initiated in 2000. In this process, it was recognized that insufficient data for wet or average hydrological conditions were available to allow calibration of the lake water quality model used to calculate the TMDL. Accordingly, a TMDL was developed to address dry hydrologic conditions only (see Section 1.B., below). This TMDL was adopted by the Regional Board in 2006 and became effective on August 21, 2007. The implementation plan included with this TMDL specifies a requirement for the development of nutrient TMDLs for wet and/or average hydrological conditions.

A key step in the development of the nutrient TMDL was the identification of the numeric targets to be achieved. The numeric targets, identified in Section 1.A., below, do not vary based upon hydrological condition. Like the approved TMDL for dry hydrological conditions, the TMDLs for wet and/or average hydrological conditions that will be developed are expected to assure also that these numeric targets are achieved. Indeed, since the TMDL for dry hydrological conditions was developed to meet the targets under the critical, worst-case conditions, consistent compliance with these targets is expected to be achieved even in the absence of TMDLs for wet/average hydrological conditions, given the greater lake volume and dilution anticipated under wetter conditions. It is recognized that future modifications to the targets may be found necessary.

1. A. Numeric Targets

As shown in Table 5-9a-c, both "causal and response" numeric targets are specified for Big Bear Lake. The causal target is for phosphorus. Phosphorus is the primary limiting nutrient in Big Bear Lake[1]. Response targets include macrophyte coverage, percentage of nuisance aquatic vascular plant species and chlorophyll *a* concentration. These response targets are more direct indicators of impairment and are specified to assess and track water quality improvements in Big Bear Lake.

A weight of evidence approach will be used to assess compliance with the TMDL, which means that data pertaining to all the numeric targets will be evaluated and non-compliance with one target will not automatically imply non-compliance with the TMDL.

[1] There is evidence that nitrogen is a limiting nutrient under certain conditions. However, given data and analytical limitations, no nitrogen targets are specified. Nitrogen monitoring is required as part of this TMDL. The data will be used to specify nitrogen targets in the future, as warranted.

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Table 5-9a-c
Big Bear Lake Nutrient TMDL Numeric Targets[a]

Indicator	Target Value
Total P concentration	Annual average[b] no greater than 35 µg/L; to be attained no later than 2015 (dry hydrological conditions), 2020 (all other times)[c]
Macrophyte Coverage	30-40% on a total lake area basis; to be attained by 2015 (dry hydrological conditions), 2020 (all other times) [c, d]
Percentage of Nuisance Aquatic Vascular Plant Species	95% eradication on a total area basis of Eurasian Watermilfoil and any other invasive aquatic plant species; to be attained no later than 2015 (dry hydrological conditions), 2020 (all other times) [c, d]
Chlorophyll *a* concentration	Growing season[e] average no greater than 14 µg/L; to be attained no later than 2015 (dry hydrological conditions), 2020 (all other times)[c]

[a] Compliance with the targets to be achieved as soon as possible, but no later than the date specified

[b] Annual average determined by the following methodology: the nutrient data from both the photic composite and discrete bottom samples are averaged by station number and month; a calendar year average is obtained for each sampling location by averaging the average of each month; and finally, the separate annual averages for each location are averaged to determine the lake-wide average. The open-water sampling locations used to determine the annual average are MWDL1, MWDL2, MWDL6, and MWDL9 (see 1.B.4. Implementation, Task 4.2, Table 5-9a-i).

[c] Compliance date for wet and/or average hydrological conditions may change in response to approved TMDLs for wet/average hydrological conditions.

[d] Calculated as a 5-yr running average based on measurements taken at peak macrophyte growth as determined in the Aquatic Plant Management Plan (see 1.B.4. Implementation, Task 6C)

[e] Growing season is the period from May 1 through October 31 of each year. The open-water sampling locations used to determine the growing season average are MWDL1, MWDL2, MWDL6 and MWDL9 (see 1.B.4. Implementation, Task 4.2, Table 5-9a-i). The chlorophyll *a* data from the photic samples are averaged by station number and month; a growing season average is obtained for each sampling location by averaging the average of each month; and finally, the separate growing season averages for each location are averaged to determine the lake-wide average.

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1.B. Big Bear Lake Nutrient Total Maximum Daily Load (TMDL) for Dry Hydrological Conditions

The TMDL technical report [Ref. #1] describes in detail the technical basis for the TMDL for Dry Hydrological Conditions that follow.

1. B. 1. Nutrient TMDL, WLAs and LAs and Compliance Dates – Dry Hydrological Conditions

A TMDL, and the WLAs and LAs necessary to achieve it, are established for total phosphorus for dry hydrological conditions only. As stated above, phosphorus and nitrogen are the nutrients that cause beneficial use impairment in Big Bear Lake. Dry hydrological conditions are defined by the conditions observed from 1999-2003; that is, average tributary inflow to Big Bear Lake ranging from 0 to 3,049 AF, average lake levels ranging from 6671 to 6735 feet and annual precipitation ranging from 0 to 23 inches. TMDLs, WLAs and LAs for wet and/or average hydrological conditions will be established as part of the TMDL Phase 2 activities once additional data have been collected (see 1.B.4. TMDL Implementation, Task 9).

The phosphorus TMDL for Big Bear Lake for dry hydrological conditions is shown in Table 5-9a-d. Wasteload allocations for point source discharges and load allocations for nonpoint source discharges are shown in Table 5-9a-e.

Table 5-9a-d

Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions

	Total Phosphorus (lbs/yr) [b]
TMDL[a]	26,012

[a] Compliance to be achieved as soon as possible, but no later than December 31, 2015.

[b] Specified as an annual average for dry hydrological conditions only.

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Table 5-9a-e

Big Bear Lake
Phosphorus Wasteload and Load Allocations for Dry Hydrological Conditions

Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions	**Total Phosphorus Load Allocation (lbs/yr)[a, b]**
TMDL	**26,012**
WLA	**475**
Urban	475
LA	**25,537**
Internal Sediment	8,555
Internal macrophyte	15,700
Atmospheric Deposition	1,074
Forest	175
Resort	33

[a] Allocation compliance to be achieved as soon as possible, but no later than December 31, 2015.

[b] Specified as an annual average for dry hydrological conditions only.

1.B.2. Margin of Safety

The Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions includes an implicit margin of safety (MOS) as follows:

1. The derivation of numeric targets based on the 25th percentile of nutrient data;
2. The use of conservative assumptions in modeling the response of Big Bear Lake to nutrient loads.

1. B.3. Seasonal Variations/Critical Conditions

The critical condition for attainment of aquatic life and recreational uses in Big Bear Lake occurs during the summer and during dry years, when nutrient releases from the sediment are greatest and water column concentrations increase. Macrophyte biomass peaks in the summer/early fall. Recreational uses of the lake are also highest during the summer. This nutrient TMDL for Big Bear Lake is focused on the critical dry hydrological conditions and, in particular, on the control of the internal sediment loads that dominate during these periods. This is the first phase of TMDLs needed to address eutrophication in Big Bear Lake. The next phase will include collection of data needed to refine the in-lake and watershed models (see 1.B.4. TMDL Implementation, Task 6A) and to develop TMDLs that address other hydrological conditions (see 1.B.4. TMDL Implementation, Task 9). TMDLs for wet and average hydrological conditions will be developed to address external loading that contributes to the nutrient reservoir in the

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lake and thus eutrophic conditions, particularly during the critical dry periods. However, it is important to note again that since the TMDL for dry hydrological conditions was developed to meet the numeric targets under the critical, worst-case conditions, consistent compliance with these targets is expected to be achieved even in the absence of TMDLs for wet/average hydrological conditions, given the greater lake volume and dilution anticipated under wetter conditions.

The TMDL recognizes that different nutrient inflow and cycling processes dominate the lake during different seasons. These processes were simulated in the in-lake model using data collected during all seasons over a multi-year period. Thus, the model results reflect all seasonal variations. The phosphorus numeric target is expressed as an annual average, while the chlorophyll *a* numeric target is expressed as a growing season average. The intent is to set targets that will, when achieved, result in improvement of the trophic status of Big Bear Lake year-round.

Compliance with numeric targets will ensure water quality improvements that prevent excessive algae blooms and fish kills, particularly during the critical summer period when these problems are most likely to occur.

1.B.4. TMDL Implementation

Table 5-9a-f outlines the tasks and schedules to implement the TMDL for Dry Hydrological Conditions. Each of these tasks is described below.

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Table 5-9a-f

Big Bear Lake Nutrient TMDL Implementation
Plan/Schedule Report Due Dates

Task	Description	**Compliance Date-As soon As Possible but No Later Than**
TMDL Phase 1		
Task 1	Establish New Waste Discharge Requirements for Nutrient Sources	February 29, 2008
Task 2	Establish New Waste Discharge Requirements for Lake Restoration Activities	February 28, 2009
Task 3	Revise Existing Waste Discharge Requirements	February 29, 2008
Task 4	Nutrient Water Quality Monitoring Program 4.1 Watershed-wide Nutrient Monitoring Plan(s) 4.2 Big Bear Lake Nutrient Monitoring Plan(s)	Plan/schedule due November 30, 2007 Annual reports due February 15
Task 5	Atmospheric Deposition Determination	Plan/schedule due August 31, 2008
Task 6	Big Bear Lake – Lake Management Plan, including: 6A. Big Bear Lake and Watershed Model Updates 6B. Big Bear Lake In-Lake Sediment Nutrient Reduction Plan 6C. Big Bear Lake Aquatic Plant Management Plan	Plan/schedule due August 31, 2008 Annual reports due February 15
TMDL Phase 2		
Task 7	Review/Revision of Big Bear Lake Water Quality Standards 7.1 Review/Revise Nutrient Water Quality Objectives 7.2 Development of biocriteria 7.3 Development of natural background definition	December 31, 2015
Task 8	Review Big Bear Lake Tributary Data	December 31, 2008
Task 9	Develop TMDLs, WLAs and LAs for wet and/or average hydrological conditions	December 31, 2012
Task 10	Review of TMDL/WLAs/Las	Once every 3 years

Task 1: Establish New Waste Discharge Requirements for Nutrient Sources

On or before February 29, 2008, the Regional Board shall issue the following new waste discharge requirements

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1.1 Waste Discharge Requirements (WDRs) or Conditional Waiver of WDRs to the US Forest Service to incorporate the nutrient load allocations, compliance schedule and monitoring and reporting requirements for Forested Areas.

Other nutrient discharges will be addressed and permitted as appropriate.

Task 2: Establish New Waste Discharge Requirements for Lake Restoration Activities

On or before February 28, 2009, the Regional Board shall issue the following new waste discharge requirements

NPDES Permit to the US Forest Service, the State of California, Department of Transportation (Caltrans), the County of San Bernardino, San Bernardino County Flood Control District, the City of Big Bear Lake, and Big Bear Mountain Resorts for Lake restoration activities, including, but not limited to alum treatment and/or herbicide treatment. Requirements specified in these Waste Discharge Requirements, shall be developed using the Aquatic Plant Management Plan and Schedule submitted pursuant to Task 6C.

Task 3: Review and/or Revise Existing Waste Discharge Requirements

Waste Discharge Requirements (WDRs) have been issued by the Regional Board regulating discharge of various types of wastes in the Big Bear Lake watershed. On or before February 29, 2008, these WDRs shall be reviewed and revised as necessary to incorporate the nutrient wasteload allocations, compliance schedule and TMDL monitoring and reporting requirements.

3.1 Waste Discharge Requirements for the San Bernardino County Flood Control and Transportation District, the County of San Bernardino and the Incorporated Cities of San Bernardino County within the Santa Ana Region, Areawide Urban Runoff, NPDES No. CAS 618036 (Regional Board Order No. R8-2002-0012). The current Order has provisions to address TMDL issues. In light of these provisions, revision of the Order may not be necessary to address TMDL requirements.

3.2 State of California, Department of Transportation (Caltrans) Stormwater Permit
Provision E.1 of Order No. 99-06-DWQ requires Caltrans to maintain and implement a Storm Water Management Plan (SWMP). Annual updates of the SWMP needed to maintain an effective program are required to be submitted to the State Water Resources Control Board.

Provision E.2 of Order No. 99-06-DWQ requires Caltrans to submit a Regional Workplan by April 1 of each year for the Executive Officer's approval. As part of the annual update of the SWMP and Regional Workplan, Caltrans shall submit plans and schedules for conducting the monitoring and reporting requirements specified in Task 4 and the special studies required in Task 6.

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Task 4: Monitoring

4.1 Watershed-wide Nutrient Water Quality Monitoring Program

No later than November 30, 2007, the US Forest Service, the State of California, Department of Transportation (Caltrans), the County of San Bernardino, San Bernardino County Flood Control District, the City of Big Bear Lake and Big Bear Mountain Resorts shall, as a group, submit to the Regional Board for approval a proposed watershed-wide nutrient monitoring program that will provide data necessary to review and update the Big Bear Lake Nutrient TMDL, to determine specific sources of nutrients and to develop TMDLs for other hydrological conditions. Data to be collected and analyzed shall address, at a minimum, determination of compliance with the phosphorus dry condition TMDL, including the WLAs and LAs, and with the existing total inorganic nitrogen (TIN) objective.

At a minimum, the proposed plan shall include the collection of samples at the stations specified in Table 5-9a-g and shown in Figure 5-7, at the frequency specified in Table 5-9a-h. Modifications to the required sampling stations, sampling frequencies and constituents to be monitored (see below) will be considered upon request by the stakeholders, accompanied by a report that describes the rationale for the proposed changes and identifies recommended alternatives. In addition to water quality samples, every two weeks on a year-round basis, visual monitoring (including documenting flow type and stage) determinations shall be made at all stations shown in Table 5-9a-g. Flow measurements will be required each time water quality samples are obtained.

At a minimum, samples shall be analyzed for the following constituents:

- Total nitrogen
- Nitrate + nitrite nitrogen
- Total phosphorus
- Total dissolved phosphorus
- Suspended sediment concentration
- Chlorophyll *a*
- Dissolved oxygen
- Alkalinity
- Bedload concentration
- Total nitrogen in sediment
- Ammonia nitrogen
- Total dissolved nitrogen
- Ortho-phosphate (SRP)
- Temperature
- Turbidity
- pH
- Conductivity
- Hardness
- Grain size
- Total phosphorus in sediment

Note: Chlorophyll *a* to be collected and analyzed only from May 1- October 31 of each year at the frequencies described in Table 5-9a-h; chlorophyll *a* sampling not required at Bear Creek outlet.

In addition, the proposed plan shall include a proposed plan and schedule for development of a Big Bear Lake Sedimentation Processes Plan for the determination of nutrient loads associated with sediment. At a minimum, the proposed plan shall include the placement of sediment traps at the mouths of Rathbun, Knickerbocker, Grout and Boulder Creeks to determine the rate of influx of sediment and particulate nutrients to Big Bear Lake, as specified in Table 5-9a-g and shown in Figure 5-7, at the specified frequency indicated in Table 5-9a-h. Modifications to the required sampling stations, sampling frequencies and constituents to be monitored will be considered upon request by the stakeholders, accompanied by a report that describes the rationale for the proposed changes and identifies recommended alternatives. The proposed monitoring plan shall be implemented upon Regional Board approval at a duly noticed public meeting. An annual report

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summarizing the data collected for the year and evaluating compliance with the TMDL/WLAs/LAs shall be submitted by February 15 of each year.

In lieu of this coordinated monitoring plan, one or more of the parties identified above may submit a proposed individual or group monitoring plan for Regional Board approval. Any such individual or group monitoring plan is due no later than November 30, 2007 and shall be implemented upon Regional Board approval at a duly noticed public meeting. An annual report of data collected pursuant to approved individual/group plan(s) shall be submitted by February 15 of each year. The report shall summarize the data and evaluate compliance with the TMDL/WLAs/LAs.

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Table 5-9a-g

Big Bear Lake Watershed
Minimum Required Sampling Station Locations

Station Number	Station Description
MWDC2	Bear Creek Outlet
MWDC3	Grout Creek at Hwy 38
MWDC4	Rathbun Creek at Sandalwood Ave.
MWDC5	Summit Creek at Swan Dr.
MWDC6	Rathbun Creek below the Zoo
MWDC8	Knickerbocker Creek at Hwy 18
MWDC13	Boulder Creek at Hwy 18

Note: Bear Creek outlet to be sampled monthly from March -November

At a minimum, samples shall be analyzed at the frequencies specified in Table 5-9a-h:

Table 5-9a-h

Big Bear Lake Watershed
Sampling Frequency

Flow type	Months monitoring is required	Frequency
Baseflow	January 1 – December 31	Once/month when baseflow is present;
Snowmelt	January 1 – May 31[1]	Varied -See note 2 below
Storm events	January 1 – December 31	3 storms per year[3]

[1] Sampling to begin after the first substantial snowfall resulting in an accumulation of 1.0 inch or more of snow

[2] Samples to be collected daily for the first three days of the snowmelt period. If ambient air temperatures remain above freezing after three days have passed, snowmelt sampling will then be performed once a week for the following three weeks or until the snowmelt period ceases. Snowmelt cessation will be determined by one of the following: a) ambient air temperatures drop below freezing during most of the day; or b) a storm/rain precipitation event occurs after the snowmelt event was initiated. Beginning March 15th of each year, snowmelt flows will most likely be continuous since ambient air temperatures will usually remain above freezing. From March 15th through May 31 of each year, snowmelt sampling events will be conducted daily for the first two days of a snowmelt event and then once a week thereafter until the spring runoff period has ended or the tributary station location shows no signs of daily flows for one week. Flow status will be evaluated in the afternoon, when ambient air temperatures are highest and flow potential is greatest.

[3] Two storm events to be sampled during October – March; 1 storm event to be sampled during April – September. For each storm event, eight samples across the hydrograph are to be collected.

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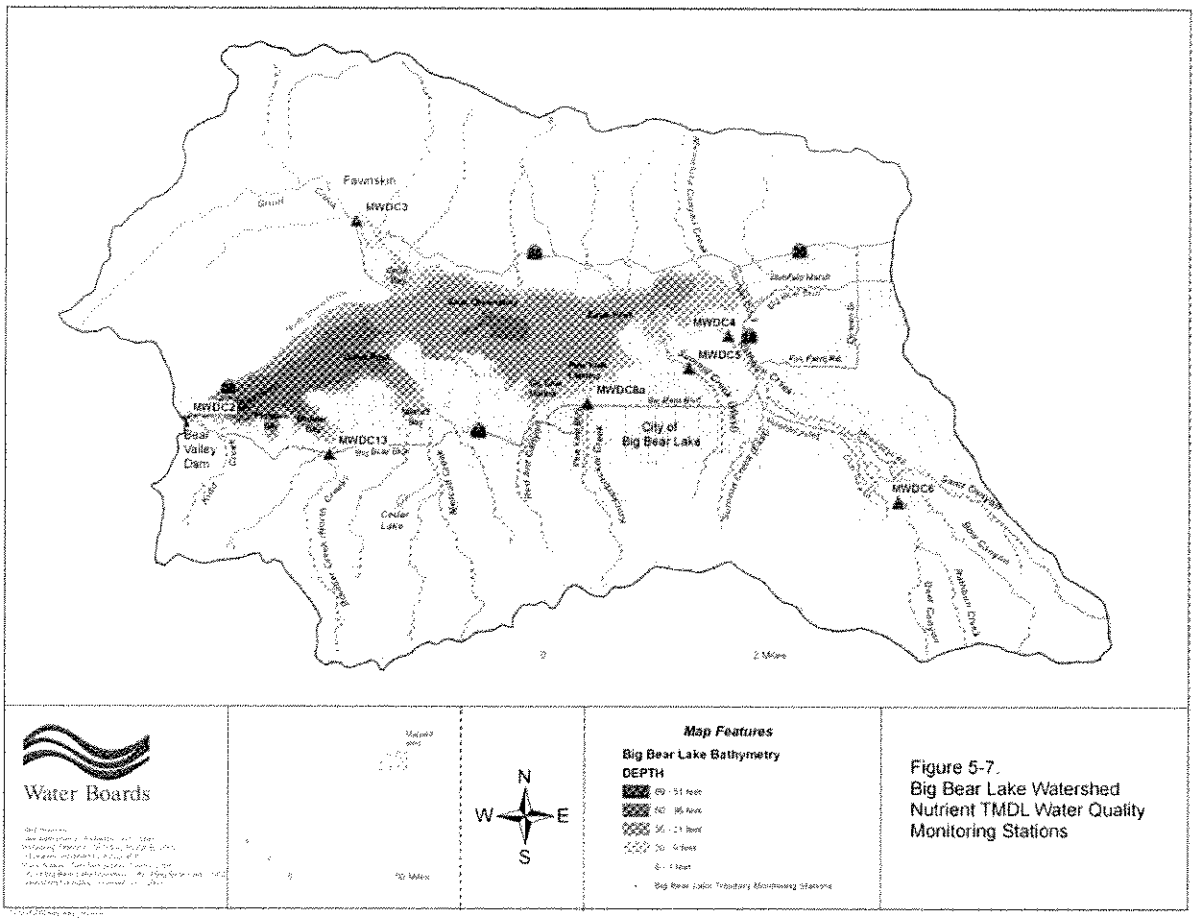

Figure 5-7 – Big Bear Lake Watershed Nutrient TMDL Water Quality Stations

4.2 Big Bear Lake: In-Lake Nutrient Monitoring Program

No later than November 30, 2007, the US Forest Service, the State of California, Department of Transportation (Caltrans), the County of San Bernardino, San Bernardino County Flood Control District, the City of Big Bear Lake, and Big Bear Mountain Resorts shall, as a group, submit to the Regional Board for approval a proposed Big Bear Lake nutrient monitoring program that will provide data necessary to review and update the Big Bear Lake Nutrient TMDL, and to develop TMDLs for other hydrological conditions. Data to be collected and analyzed shall address, at a minimum: (1) determination of compliance with phosphorus and chlorophyll *a* numeric targets; (2) determination of compliance with the existing total inorganic nitrogen (TIN) objective; and (3) refinement of the in-lake model for the purposes of TMDL review and development.

At a minimum, the proposed plan shall include the collection of samples at the stations specified in Table 5-9a-i and shown in Figure 5-8, at the specified frequency indicated in Table 5-9a-i. Modifications to the required sampling stations, sampling frequencies and constituents to be monitored (see below) will be considered upon request by the stakeholders, accompanied by a report that describes the rationale for the

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proposed changes and identifies recommended alternatives. With the exception of hardness, alkalinity, total organic carbon (TOC), dissolved organic carbon (DOC), and chlorophyll *a,* each sample to be analyzed shall be collected as a photic zone composite (from the surface to 2 times the secchi depth) and as a bottom discrete (0.5 meters off the surface bottom) sample. Hardness, alkalinity, TOC, DOC, and chlorophyll *a* shall be collected as photic zone composites. Dissolved oxygen, water temperature, turbidity, specific conductance, and pH shall be measured at 1-meter intervals from the surface to 0.5 meters from the bottom using a multi-parameter water quality meter. Water clarity shall be measured with a secchi disk.

At a minimum, in-lake samples must be analyzed for the following constituents:

- Specific conductance
- Water temperature
- Chlorophyll *a*
- Total nitrogen
- Nitrate +nitrite nitrogen
- Total phosphorus
- Total hardness
- Total dissolved phosphorus
- Dissolved organic carbon (DOC)
- Total dissolved nitrogen
- Dissolved oxygen
- Water clarity (secchi depth)
- Ammonia nitrogen
- Alkalinity
- Turbidity
- Ortho-phosphate (SRP)
- Total suspended solids (TSS)
- pH
- Total dissolved solids (TDS)
- Total organic carbon (TOC)

The monitoring plan shall be implemented upon Regional Board approval at a duly noticed public meeting. An annual report summarizing the data collected for the year and evaluating compliance with the TMDL/WLAs/LAs and numeric targets shall be submitted by February 15 of each year.

Table 5-9a-i

Big Bear Lake Minimum Required Sampling Station Locations

Station Number	Station Description
MWDL1	Big Bear Lake – Dam
MWDL2	Big Bear Lake – Gilner Point
MWDL6	Big Bear Lake – Mid Lake Middle
MWDL9	Big Bear Lake – Stanfield Middle

Frequency of sampling at all stations: for all constituents except TOC and DOC, monthly from March – November; bi-weekly (i.e., every other week) from June 1 through October 31. TOC and DOC to be monitored four times per year (quarterly) from January through December.

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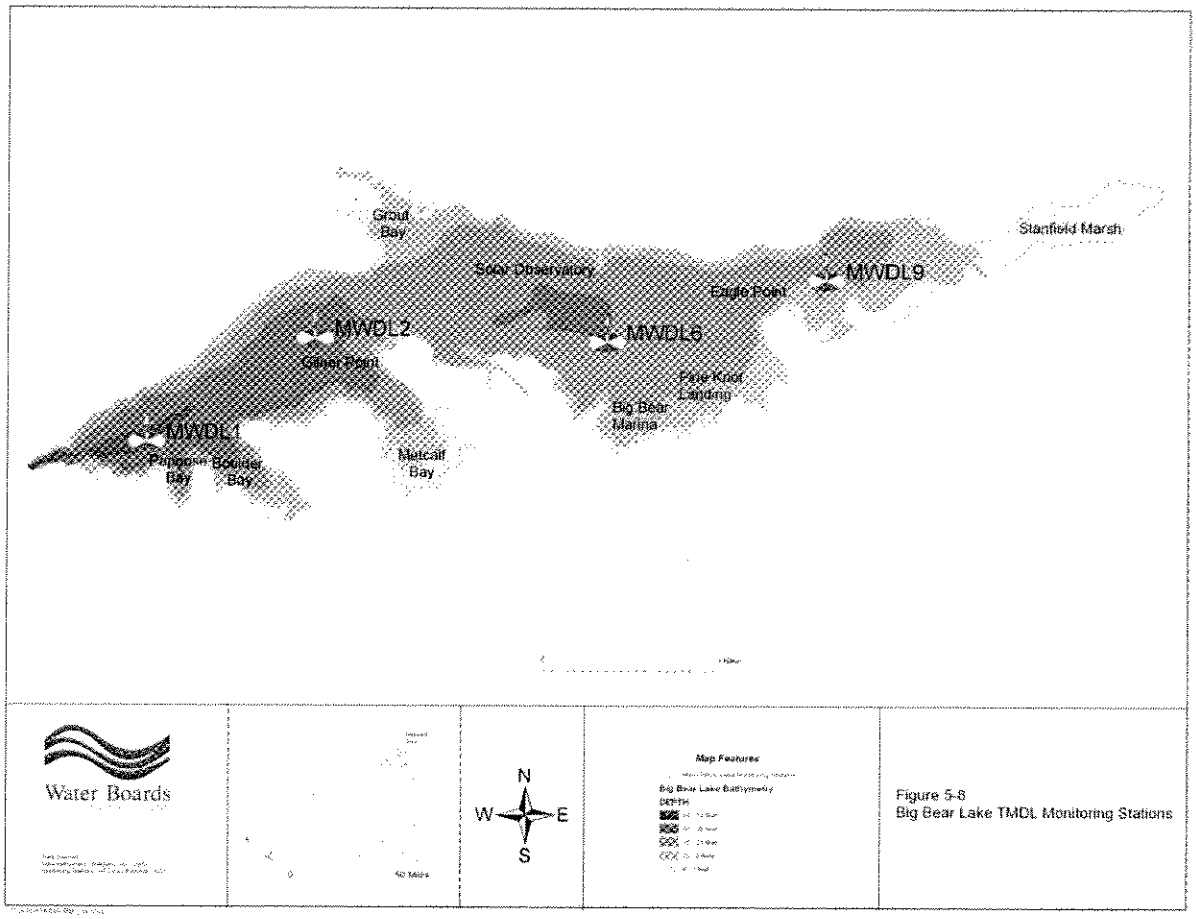

Figure 5-8 Big Bear Lake TMDL Monitoring Stations

In lieu of this coordinated monitoring plan, one or more of the parties identified above may submit a proposed individual or group monitoring plan for Regional Board approval. Any such individual or group monitoring plan is due no later than November 30, 2007 and shall be implemented upon Regional Board approval at a duly noticed public meeting. An annual report of data collected pursuant to approved individual/group plan(s), shall be submitted by February 15 of each year. The report shall summarize the data and evaluate compliance with the TMDL/WLAs/LAs and numeric targets.

Task 5: Atmospheric Deposition Determination

No later than August 31, 2008, the Regional Board, in coordination with local stakeholders, the South Coast Air Quality Management District and the California Air Resources Board, shall develop a plan and schedule for quantifying atmospheric deposition of nutrients in the Big Bear Lake watershed.

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Task 6: Big Bear Lake-Lake Management Plan

No later than August 31, 2008, the US Forest Service, the State of California, Department of Transportation (Caltrans), the County of San Bernardino, San Bernardino County Flood Control District, the City of Big Bear Lake, and Big Bear Mountain Resorts, shall, as a group, submit to the Regional Board for approval a proposed Lake Management Plan for Big Bear Lake. The purpose of the plan is to identify a coordinated and comprehensive strategy for management of the lake and surrounding watershed to address restoration and protection of the lake's beneficial uses.The plan shall include the following:

A) A proposed plan and schedule for updating the existing Big Bear Lake watershed nutrient model and the Big Bear Lake in-lake nutrient model. The plan and schedule must take into consideration additional data and information that are or will be generated from the required TMDL monitoring programs (Tasks 4.1 and 4.2, above).

B) A proposed plan and schedule for in-lake sediment nutrient reduction for Big Bear Lake. The proposed plan shall include an evaluation of the applicability of various in-lake treatment technologies to support development of a long-term strategy for control of nutrients from the sediment. The submittal shall also contain a proposed sediment nutrient monitoring program to evaluate the effectiveness of any strategies implemented.

C) The proposed plan shall include an evaluation of the applicability of various in-lake treatment technologies to control noxious and nuisance aquatic plants. The plan shall also include a description of the monitoring conducted and proposed to track aquatic plant diversity, coverage, and biomass. Data to be collected and analyzed shall address, at a minimum, determination of compliance with the numeric targets for macrophyte coverage and percentage of nuisance aquatic vascular plant species (see 1.A., above).

In addition, at a minimum, the proposed plan shall also address the following:

- The plan shall be based on identified and acceptable goals for lake capacity, biological resources and recreational opportunities. Acceptable goals shall be identified in coordination with the Regional Board and other responsible agencies, including the California Department of Fish and Game and the U.S. Fish and Wildlife Service.
- The plan shall include a proposed plan and schedule for the development of biocriteria for Big Bear Lake. (This is intended to complement Regional Board efforts to develop biocriteria and to signal the parties' commitment to participate substantively.)
- The plan must identify a scientifically defensible methodology for measuring changes in the capacity of the lake.
- The proposed plan shall identify recommended short and long-term strategies for control and management of sediment and dissolved and particulate nutrient inputs to the lake.
- The plan shall also integrate the beneficial use survey information required to be developed pursuant to the Regional Board's March 3, 2005, Clean Water Act Section 401 Water Quality Standards Certification for Big Bear Lake Nutrient/Sediment Remediation Project, City of Big Bear Lake, County of San Bernardino, California. The purpose of the beneficial use survey is to correlate beneficial uses of the lake with lake bottom contours. The survey is required to be conducted throughout the lake. The survey will determine the location and the quality of beneficial uses of the lake and the contours of the lake bottom where these uses occur. The survey is expected to be used in regulating future lake dredge projects to maximize the restoration and protection of the lake's beneficial uses.

The Big Bear Lake – Lake Management Plan shall be implemented upon Regional Board approval at a duly noticed public meeting. Once approved, the plan shall be reviewed and revised as necessary at least once

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every three years. The review and revision shall take into account assessments of the efficacy of control/management strategies implemented and relevant requirements of new or revised TMDLs for Big Bear Lake and its watershed. An annual report summarizing the data collected for the year and evaluating compliance with the TMDL/WLAs/LAs and numeric targets shall be submitted by February 15 of each year.

In lieu of this coordinated plan, one or more of the parties identified above may submit a proposed individual or group Big Bear Lake – Lake Management Plan and schedule for approval by the Regional Board. Any such individual or group plan must conform to the requirements specified above and is due no later than August 31, 2008. An individual or group plan shall be implemented upon Regional Board approval at a duly noticed public meeting. An annual report summarizing the data collected for the year and evaluating compliance with the TMDL/WLAs/LAs and numeric targets shall be submitted by February 15 of each year.

Task 7: Review and Revision of Big Bear Lake Water Quality Standards

By December 31, 2015, the Regional Board shall:

7.1 Review/revise as necessary the total inorganic nitrogen and total phosphorus numeric water quality objectives for Big Bear Lake. The Regional Board shall also consider the development of narrative or numeric objectives for other indicators of impairment (e.g., chlorophyll *a*, macrophyte coverage and species composition), in lieu of or in addition to review/revision of the numeric objectives for phosphorus and nitrogen.

7.2 Develop biocriteria for Big Bear Lake.

7.3 Develop a definition for natural background sources of nutrients (and other constituents) to Big Bear Lake and its tributaries.

Given budgetary constraints, completion of these tasks are likely to require substantive contributions from interested parties.

Task 8: Review of Big Bear Lake Tributary Data

No later than December 2008, the Regional Board shall review data collected on Rathbun Creek, Summit Creek and Grout Creek to determine whether beneficial uses of these tributaries are impaired by nutrients. If the Creeks are found to be impaired by nutrients, the Regional Board shall develop a TMDL development project plan and schedule.

If these tributaries are found not to be impaired by nutrients, Regional Board shall schedule the delisting of the tributaries from the 303(d) list of impaired waters at the earliest opportunity.

Task 9: Development of TMDLs for Wet and/or Average Hydrological Conditions

No later than December 31, 2012, the Regional Board shall utilize additional water quality data and information collected pursuant to monitoring program requirements (Tasks 4 and 5) and model updates (Task 6A) to develop proposed nutrient TMDLs for Big Bear Lake for wet and/or average hydrological conditions. Completion of this task is contingent on the collection of requisite data for wet and/or average hydrological conditions.

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Task 10: Review/Revision of the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions (TMDL "Re-opener")

The basis for the TMDL for Dry Hydrological Condtions, the implementation plan and schedule will be re-evaluated at least once every three years[2] to determine the need for modifying the allocations, numeric targets and TMDL. Regional Board staff will continue to review all data and information generated pursuant to the TMDL requirements on an ongoing basis. Based on results generated through the monitoring programs, special studies and/or modeling analyses, changes to the TMDL may be warranted. Such changes will be considered through the Basin Plan Amendment process.

The Regional Board is committed to the review of this TMDL every three years, or more frequently if warranted by these or other studies.

References

1. California Regional Water Quality Control Board, Santa Ana Region. Staff Report on the Nutrient Total Maximum Daily Loads for Big Bear Lake, June, 2005.

[2] The three-year schedule is tied to the 3 year triennial review schedule.

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January 28, 2011

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Peter Silva
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Dear Ms. Jackson and Mr. Silva:

The undersigned municipal organizations write in response to the recent distribution of a November 12, 2010 memorandum from James A. Hanlon, Director of the Office of Wastewater Management, and Denise Keehner, Director of the Office of Wetlands, Oceans and Watersheds, to all Water Management Division Directors in EPA Regions 1 – 10, entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.'" In this memorandum, EPA states that it is "updating and revising" four elements of the 2002 guidance in order to reflect "current practices and trends" in permits and WLAs for stormwater discharges, specifically:

- Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a WLA;
- Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and
- Designating additional stormwater sources to regulate and treating load allocations as wasteload allocations for newly regulated stormwater sources.

The undersigned organizations have serious concerns both with the substance of this memorandum, particularly with the first and third elements above, and with the process and timing of its distribution. We believe that the memorandum contains significant misstatements of the existing law and regulations applicable to municipal separate storm sewer systems (MS4s), and that even if the memorandum itself is not subject to judicial review any future NPDES

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permits or TMDLs based on the guidance contained in the memorandum would be subject to legal challenge.

Process and Timing

As it stands, the November 12 memorandum would make sweeping changes in the Agency's existing approach to the development of WLAs for municipal stormwater sources and the issuance of MS4 permits for those sources. These changes appear to reflect some of the options that are currently being considered by the Agency in the context of the national rulemaking it has initiated to strengthen its stormwater regulatory program. That initiative was announced by the Agency on December 28, 2009 (74 Fed. Reg. 68617), and EPA has subsequently stated that its intention is to issue a final regulation by November of 2012. All of the undersigned organizations and many of their individual members have participated in this rulemaking initiative, and have submitted written comments to the Agency regarding its proposed changes to the stormwater permit program. The unexpected release of the November 12 guidance memorandum is particularly inappropriate in light of this ongoing rulemaking effort, because the substance of the memorandum effectively presumes the outcome of that initiative before a proposed version of the regulation has been made available for public review and comment.

Furthermore, the issuance of the November 12 memorandum without solicitation of any input from the regulated community is procedurally improper, because the memorandum proposes significant substantive changes to existing EPA policy. For example, the 2002 guidance stated that:

> EPA expects that most WQBELs for NPDES-regulated municipal and small construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.

This statement was consistent with EPA's existing stormwater regulations at 40 CFR §122.34 and with the guidance contained in EPA's August 26, 1996 *Interim Permitting Approach for Water-Quality Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg.43761, and its November 6, 1996 *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 57425. Each of the latter two documents were formal policies signed by the Assistant Administrator for Water and duly published in the Federal Register. In contrast to the approach described in those formal regulations and policy statements, the November 12 memorandum states that EPA's "expectations have changed as the stormwater permit program has matured," and that:

> EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so.

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The expression of such a fundamental change in EPA's approach to MS4 permitting in an informal guidance memorandum, without public review or comment and without publishing notice of its issuance in the Federal Register is improper. A substantial body of case law suggests that when an agency significantly changes its interpretation of an existing policy, the agency must do so after engaging in formal notice and comment rulemaking. *See, e.g., Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997); *Appalachian Power Co. v. EPA*, 208 f.3d 1015 (DC. Cir. 2000). In *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003), the D.C. Circuit Court of Appeals held that a document containing "clear and unequivocal language, which reflects an obvious change in established agency practice," is subject to notice and comment rulemaking requirements under the Administrative Procedure Act. Similarly, in *Alaska Professional Hunters Ass'n, Inc. v. Federal Aviation Administration*, 177 F.3d 1030 (D.C. Cir. 1999), the court stated that:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C.Cir.1997), is to the same effect: a modification of an interpretive rule construing an agency's substantive regulation will, we said, "likely require a notice and comment procedure."

The November 12 memorandum clearly reflects a fundamental change in the Agency's previous interpretations of its existing municipal stormwater permit regulations. To move from the position that numeric effluent limitations will be used "only in rare instances" to a recommendation that such limits should be used "where feasible" is the type of "obvious change" in the Agency's permitting regime that was addressed in the *CropLife* decision. 329 F.2d at 881.

Indeed, the memorandum goes even further than this, by stating that the type of numeric, water quality-based effluent limitations that EPA now expects to see included in both municipal and industrial stormwater permits should "use numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants, such as stormwater flow volume or percentage or amount of impervious cover." This would represent a dramatic change in the type of conditions that have been required in such permits over the last two decades of the stormwater program. Despite certain verbal assurances that we have received from the Agency that it does not intend to impose such restrictions as end-of-pipe limits on each individual MS4 outfall, that is the advice which the memorandum appears on its face to be giving to State and Regional permitting authorities.[1] If the memorandum means what it appears to say, it would be a major shift in policy that should only be adopted after formal consultation with affected members of the regulated community and the public at large.

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[1] As noted at page 4 of the memorandum, EPA recognized at the time of its original, 2002 guidance memo that "the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis." However, the memorandum suggests that permit writers now "may have better data or better access to data and, over time, may have gained more experience since 2002" in developing WLAs for specific categories of discharges.

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Mischaracterization of Existing Law and Regulation

1. Compliance with Water Quality Standards.

We have serious concerns with EPA's mischaracterization of the applicable statutory and regulatory requirements for municipal stormwater permits in the memorandum. The Agency's purported justification for the imposition of numeric effluent limitations in MS4 permits relies upon a distortion of the plain language of the Clean Water Act (CWA), and a mischaracterization of the Ninth Circuit's holding in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). The opening clause of CWA § 402(p)(3)(b)(iii) states that, unlike industrial stormwater permits, MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." A subordinate clause goes on to specify that such controls shall include "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." Each of those controls is subject to the limitation in the first clause that they shall be required "to the maximum extent practicable."

However, EPA's November 12 memorandum paraphrases this provision in a manner which suggests that the final clause referring to "such other provisions as the Administrator or the State determines appropriate" is independent and coequal with the requirement to reduce pollutants to the "maximum extent practicable." This paraphrase distorts the syntax of § 402(p)(3)(B)(iii) and the intent of Congress in enacting this provision. The November 12 memorandum also suggests, incorrectly, that the Ninth's Circuit's opinion in *Defenders* supports this misreading of the statute. It is true that, in *dicta* at the end of its decision, the court suggested that the "such other provisions" clause allowed EPA the discretion to include "either management practices or numeric limitations" in MS4 permits. The court did not say, however, that the discretion to include numeric limitations or to require compliance with water quality standards could be exercised without regard to the "maximum extent practicable" limitation in the statute. That issue was not presented by the facts of the case before it, and it was not addressed in the court's opinion. Had the court so ruled, it would have been contrary to the plain language of the statute and subject to reversal on appeal.

In fact, the federal courts have consistently ruled that the MEP standard is the only standard that MS4 discharges are required to meet. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992) (CWA § 402(p)(3)(B) "retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999) (CWA § 402(p)(3)(B) "replaces" the requirements of § 301 with the MEP standard for MS4 discharges, and it creates a "lesser standard" than § 301 imposes on other types of discharges); *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003), *vacated, rehearing denied by, and amended opinion issued at* 344 F.3d 832 (9th Cir. 2003) (CWA "requires EPA to ensure that operators of small MS4s 'reduce the discharge of pollutants to the maximum extent practicable'"); *Mississippi River Revival, Inc. v. City of St. Paul*, 2002 U.S. Dist. LEXIS 25384 (N.D. Minn. 2002) ("the CWA specifically exempts municipal storm water permittees" from the requirement to ensure that water quality standards are met).

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Consequently, the Agency's recommendation in the November 12 memorandum that, where feasible, NPDES authorities should include numeric effluent limitations as necessary to meet water quality standards whenever MS4 discharges have the reasonable potential to cause or contribute to an excursion of those standards not only signals a dramatic change in EPA's existing policy, but also exceeds the Agency's authority under the CWA. The qualification that such limits shall be used where "feasible" appears to relate only to the permitting authority's technical ability to calculate the necessary limitations, whereas the "maximum extent practicable" standard in the CWA was intended to encompass both the technical and economic achievability of the controls imposed on municipal dischargers. Further, stormwater discharges are highly variable in peak and volume. Implementation of numeric effluent limits to stormwater discharges fails to recognize this variability. Current stormwater treatment technologies are generally limited to treating the first 3/4" to 1" of rainfall during a 24 hour period. Technologies to economically treat larger or longer storms do not exist. Lastly, many existing state water quality standards were developed prior to the 1987 CWA amendments that led to the creation of NPDES programs for stormwater management. Consequently, they did not foresee the need to consider the ramifications of managing stormwater when setting water quality standards. Most existing standards are limited to consideration of steady-state streamflow conditions that occur during dry weather. Existing water quality standards are therefore inappropriate for managing transitory, non-steady state storm flow conditions and inappropriate for establishing numeric effluent limits in stormwater permits for storm flow conditions.

Moreover, it is not at all clear that the types of numeric effluent limitations contemplated by the memorandum are "feasible" in a purely technical sense. For example, a recent study on "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" contained in the Storm Water Panel Recommendations to the California State Water Resources Control Board (June 19, 2006) concluded that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges," and that "[f]or catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible." EPA suggests in the memorandum that State and EPA have obtained "considerable experience" in calculating TMDLs and WLAs for stormwater sources since 2002, that monitoring the impacts of stormwater sources has become "more sophisticated and widespread," and that "better information" on the effectiveness of stormwater controls is now available. However, it does not provide that information in this memorandum, nor does it suggest that the recent information and experience to which it alludes support the technical feasibility of reducing the impact of municipal stormwater sources to meet the type of numeric effluent limitations it seeks to impose. The undersigned organizations would appreciate the opportunity to review and discuss this information.

2. Consistency with TMDL Wasteload Allocations.

The November 12 memorandum also misrepresents existing law in stating that, if the State or EPA has established a TMDL for an impaired water that includes WLAs for stormwater discharges, "permits for either industrial stormwater discharges or MS4 discharges must contain effluent limits and conditions consistent with those WLAs." The requirement to meet TMDL WLAs is merely a subset of the requirement to meet water quality standards, which those WLA's

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are calculated to implement.[2] Since MS4 discharges are not subject to the requirement to meet water quality standards to begin with, they cannot be required to comply with TMDL WLAs without regard to the "maximum extent practicable" standard established in the Act.

The only authority cited in the memorandum for EPA's assertion that both industrial and municipal stormwater permits must contain effluent limitations consistent with TMDL WLAs is a subsection in the Agency's general NPDES permit regulations at 40 CFR § 122.44(d)(1)(vii)(B). However, that rule does not apply to municipal stormwater permits. The opening sentence of 40 CFR § 122.44 states that "each NPDES permit shall include conditions meeting the following requirements when applicable." The rule then enumerates a variety of permit conditions, some of which apply to municipal stormwater permits, and others that do not. The subject of subsection (d) is the requirement to ensure compliance with state water quality standards, which (as discussed above) applies to all NPDES permits except MS4 permits.

The opening sentence to subsection (d) of the rule has been included in the Agency's general NPDES permit regulations since 1983, long before the 1987 CWA amendments created the separate and independent "maximum extent practicable" standard for MS4 discharges. In 1989, subsection (d) was expanded by the addition of the seven subparagraphs in § 122.44(d)(1) to further describe the procedures a permitting authority should use to determine whether an NPDES permit must include a water quality-based effluent limit. 54 Fed. Reg. 23868 (June 2, 1989). Each of the additional provisions was intended to describe the procedures for implementing state water quality standards. Subparagraph (vii) was added to describe two fundamental principles for deriving water quality-based effluent limits: first, that they must be derived from water quality standards, and second that they must be consistent with any WLAs based upon those water quality standards. *Id.*

Shortly after the 1989 revisions to 40 CFR § 122.44 were promulgated, EPA issued an August 21, 1989 memorandum from James R. Elder, Director, Office of Water Enforcement, to Water Management Division Directors, Regions I – X entitled "New Regulations Governing Water Quality-Based Permitting in the NPDES Permitting Program" That memorandum emphasized that the additional provisions in 40 CFR § 122.44(d) were merely intended to clarify existing requirements for water quality-based permitting. As explained in the memorandum,

> Subsection (d) covers water quality standards and state requirements. Prior to the promulgation of these new regulations the subsection was non-specific, requiring only that NPDES permits be issued with requirements more than promulgated effluent guidelines as necessary to achieve water quality standards. We have strengthened considerably the requirements of §122.44(d). The new language is very specific and requires water quality-based permit limits for specific toxicants and whole effluent toxicity where necessary to achieve state water quality standards. (Emphasis added.)

Because MS4 permits are not required to achieve state water quality standards, as discussed above, none of the requirements in 40 CFR § 122.44(d) are applicable to such permits. Pursuant to the plain language of the CWA, and consistent with the Ninth Circuit's decision in *Defenders*

[2] Cf. 40 CFR § 130.2(h): "WLAs constitute a type of water quality-based effluent limitation."

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of Wildlife v. Browner, EPA may exercise its discretion to require MS4 discharges to comply with water quality standards, or WLAs based on those standards, only to the "maximum extent practicable."

Use of Surrogates for Pollutant Parameters

The undersigned organizations all support the goal of reducing pollutants and improving water quality. However, we have serious concerns with EPA's suggestion in the November 12 memorandum that NPDES authorities should use a numeric target for stormwater volume or impervious cover as a "surrogate parameter" for specific pollutants when developing TMDL WLAs for waters impaired by stormwater sources. We do not believe that the CWA or the Agency's implementing regulations give EPA the authority to regulate flow as a surrogate for pollutants in TMDLs. CWA § 303(d) requires each State to establish the total maximum daily load for specific "pollutants," at a level necessary to implement the applicable water quality standards for those pollutants. Stormwater flow or volume, while it may contribute to "pollution" within the meaning of CWA § 502(19), is not a "pollutant" as defined in CWA § 502(6). We do not believe that the statement in 40 CFR §130.2(i) that "TMDLs can be expressed in terms of mass per time, toxicity or other appropriate measure" relieves the permitting authority of the obligation to calculate the necessary load for specific pollutants. Nor does the mere fact that "it may be difficult to identify a specific pollutant (or pollutants) causing the impairment" for waters impaired by stormwater sources excuse the requirement that "TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards." 40 CFR § 130.7(c)(1)(ii).

Although the concept of using flow or impervious cover as surrogates for pollutants in setting TMDL loading targets may have been implemented in some States (Connecticut, Maine and Vermont), as EPA suggests, to our knowledge the legal basis for this approach has not yet been examined by the courts, and it has been opposed in other locations. For example, the comments filed by the Commonwealth of Virginia Department of Transportation (VDOT) to the draft Benthic TMDL for Accotink Creek in Fairfax County, Virginia, point out that since stream flow is not a pollutant the draft TMDL fails to establish a quantifiable load for anything within the legal definition of a pollutant. VDOT recommends, instead, that stream flow and subsequent reductions in flow be identified as possible best management practices during implementation as opposed to being used for the WLA.[3]

We agree that reductions in stormwater flow through the implementation of BMPs, including "green infrastructure" and "low impact development" can help reduce pollutant loads from municipal stormwater sources and achieve improvements in water quality. However, under the Agency's existing statutory and regulatory authority, those reductions cannot be expressed as specific numeric targets for stormwater flow volume or impervious cover in calculating TMDL WLAs.

[3] Comments submitted to EPA Region 3 on August 11, 2010.

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Conclusion

The undersigned organizations and their members are committed to improving municipal stormwater quality through the use of BMPs and green infrastructure/LID concepts. We are eager to continue working with the Agency on water quality improvements for both stormwater and non-stormwater discharges. However, the implementation of numeric limits continues to be inappropriate both economically and technologically until such time as treatment technology advances to a state where larger volume flows can be treated in a more economic fashion. Given these difficulties and in light of the dramatic changes to EPA's existing policies for municipal stormwater permits reflected in the November 12 memorandum, as well as the fundamental shortcomings in the Agency's analysis of its legal authority for those changes, we recommend that the memorandum be withdrawn for further consideration. That process should include consultation with the regulated community, and we look forward to working with the Agency in that regard. Further, such sweeping changes to the Agency's municipal stormwater program are premature and should not be implemented prior to the release of the final regulations that the Agency is expecting to issue by November of 2012.

Sincerely,

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Executive Director
American Public Works Association

Ken Kirk
Executive Director
National Association of Clean Water Agencies

Susan Gilson
Executive Director
National Association of Flood & Stormwater Management Agencies

cc: Nancy Stoner, OW
James Hanlon, OWM
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Water Management Division Directors, Regions 1-10
Water Quality Branch Chiefs, Regions 1 - 10
Permits Branch Chiefs, Regions 1 – 10
Association of State and Interstate Water Pollution Control Administrators

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EXHIBIT F

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California Regional Water Quality Control Board
Santa Ana Region

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Edmund G. Brown Jr.
Governor

March 30, 2011

Mr. Granville M. Bowman
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SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD COMMENTS ON THE DRAFT COMPREHENSIVE BACTERIA REDUCTION PLAN; ORDER R8-2010-0036, NPDES NO. CAS618036, SECTION V.D.2.b.

Dear Mr. Bowman:

We have received your letter, dated December 31, 2010, transmitting the Draft Comprehensive Bacteria Reduction Plan (draft CBRP). The draft CBRP was submitted in accordance with Section V.D.2.b of Santa Ana Regional Board Order No. R8-2010-0036, NPDES No. CAS618036 (MS4 permit). We have reviewed the draft CBRP and find that additional information is needed prior to Regional Board consideration of approval of the CBRP. Please submit a revised CBRP addressing the issues described below.

Overarching Comments

We recognize the significant efforts the MS4 agencies have made to comply with MS4 permit and Middle Santa Ana River bacteria indicator TMDL (MSAR TMDL) requirements and to develop and submit the draft CBRP. Overall, we believe that the draft CBRP identifies appropriate *potential* mechanisms to address bacterial indicator management. However, the draft CBRP fails to identify a specific plan and schedule to implement one or more of these mechanisms, apart from certain measures explicitly required by the MS4 permit (e.g., activities related to illicit discharges (IDDE program)). This is contrary to our expectations, which we had discussed during the development of the MS4 permit; it is also contrary to the explicit requirements of the MS4 permit itself. Section V.D.2.b provides the method by which the Final WQBELs for MSAR TMDL Bacterial Indicator TMDL under dry weather conditions should be developed and implemented. This includes the option to submit and implement a CBRP that describes, *in detail*, the specific actions that have been taken or will be taken to achieve compliance with the urban wasteload allocation under dry weather conditions by December 31, 2015 (the compliance date specified in the MSAR TMDL, as incorporated into the Water Quality Control Plan (Basin Plan)). (Sec. V.D.2.b. i.) The MS4 permit also specified the items that must be included in the CBRP. (Sec. V.D.2.b.i. a-j) These include the scientific and technical documentation used to conclude that the CBRP, once fully implemented, is expected to achieve compliance with the urban wasteload allocation for indicator bacteria by December 31, 2015. (Sec. V.D.2.b.i.(e))

In contrast, the draft CBRP largely identifies a plan to develop plans, i.e., a plan to evaluate various potential bacteria reduction mechanisms, with the development of more specific implementation plans contingent on the results of those evaluations and other

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considerations, including financial feasibility. While scientific and technical evidence is provided in Section 6 of the draft CBRP regarding the expectation that the urban wasteload allocation will be met, this evidence is based solely on hypothetical implementation of the potential mechanisms identified in the draft CBRP, rather than actual analysis of the expected effect of specific measures proposed to be implemented.

While we understand and appreciate the need for an adaptive approach, we believe that there has been adequate time since the approval of the TMDLs in 2005 to complete most if not all of the requisite evaluations, such that a specific program of actions should now be identifiable. Accordingly, the CBRP must identify these actions, and commitments to implement them, before Board staff can recommend its approval. This is particularly true given the regulatory significance of the CBRP: as you are aware, under the terms of the MS4 permit (Section II.F.13.c.vii), in the absence of an approved CBRP, the WLAs identified in the permit become the final numeric water quality-based effluent limits that must be achieved by December 31, 2015. To fulfill its performance-based, alternative role, the CBRP cannot simply identify a plan to develop plans; it must describe, in detail, the specific actions that have been taken or will be taken to achieve compliance with the urban wasteload allocation under dry weather conditions.

Additionally, it is important to clarify or correct the language in Section 1.2.2 regarding the applicability of the CBRP, and in Section 1.2.3 regarding compliance with the urban wasteload allocations. The first bullet item in Section 1.2.2 states that the CBRP is designed to mitigate, *to the maximum extent practicable (MEP)*, controllable urban sources of bacterial indicators that cause non-attainment of water quality objectives. [Emphasis added.] Likewise, Section 1.2.3 of the CBRP states, "[t]his CBRP is designed to achieve compliance with the dry weather urban wasteload allocation *to the MEP* by December 31, 2015." [Emphasis added.] These references to MEP are extraneous and inconsistent with the clear permit terms. The MS4 permit requires compliance with the Final WQBELs no later than December 31, 2015. The Final WQBELs may be the development and implementation of a CBRP that will achieve compliance with the urban wasteload allocations under dry weather conditions, not compliance with the urban wasteload allocations to the MEP. (Obviously, the draft CBRP you have submitted is intended to fulfill this requirement.) Alternatively, if the CBRP approach is not completed in a timely manner, the urban wasteload allocations for dry weather conditions become the final numeric WQBELs. In either case, the MS4 permit expectation is that these WQBELs will be met by December 31, 2015.

Finally, we are concerned about language in the draft CBRP (e.g., Section 1.2. Applicability, first bullet) that refers to "watershed-wide compliance sites". We recognize that a Regional Board approved watershed-wide monitoring program is in place and is intended to provide information concerning compliance with bacterial indicator objectives in the receiving waters. We also understand that, as a practical matter, it is infeasible to monitor receiving water compliance at every point in the watershed and that it is therefore reasonable and appropriate to identify specific sites where compliance will be assessed. However, the language in the first bullet (Bacteria Indicator Sources) could be read to indicate that the CBRP will be designed to address controllable bacterial indicator sources that cause non-attainment of bacteria objectives *only* at the watershed-wide compliance sites. It should be acknowledged that the expectation is that measures will be implemented to assure compliance with applicable objectives throughout the watershed.

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While we believe that substantive revision of the draft CBRP is needed to fulfill the applicable MS4 permit requirements described above, we offer the following specific comments on the draft CBRP, which may be helpful in making the needed revisions.

Specific Draft CBRP Comments

1. The approach for compliance proposed in the draft CBRP assumes that all required regulatory agencies will adopt the recommendations for changes to recreation standards developed by the Storm Water Quality Standards Task Force (SWQSTF), including changes to bacterial indicator water quality objectives, and removal of REC1 and/or REC2 designations for specific waters through use attainability analyses (UAAs). However, whether and to what extent changes to the recreation standards will be adopted is not certain. The draft CBRP should identify the actions that will be taken to assure standards compliance if changes to recreation standards are not approved.

2. Section 5.2.1 of the draft CBRP describes the use of water conservation and pathogen control ordinances as management practices that may help reduce dry weather flows (DWFs) and thus bacterial indicator levels in impaired water bodies. However, the draft CBRP did not include a clear commitment to adopting specific ordinances or providing funding for enforcement of these ordinances. The draft CBRP should identify obstacles to the adoption of specific ordinances, a schedule for consideration of adoption of these ordinances, and a clear commitment to support and fund enforcement of these ordinances, when and if approved. In addition, please indicate how the effects of these ordinances will be measured and a schedule for collecting such measurement data.

3. Section 5.2.2.1 of the draft CBRP indicates that there are two essential questions that need to be evaluated prior to fully engaging in a process that involves eliminating transient camps. However, the questions are not explicitly stated. Please clearly state the questions and how their answers will be used to shape this draft CBRP element.

4. Section 5.2.2.2 of the draft CBRP describes development of an illicit discharge, detection, and elimination program in accordance with MS4 permit requirements. However, other than development of the program, the draft CBRP did not indicate who would be conducting inspections nor did it provide specific details regarding specific goals and objectives for the program (i.e., number of inspections per given time period, length of water body per inspection, etc.). Please provide this information.

5. Section 5.2.2.3 of the draft CBRP indicates that existing street sweeping programs will be evaluated and that a plan and schedule for a revised program will be developed based upon the evaluation. A summary of street sweeping activities (number of curb-miles) in San Bernardino municipalities was provided for the years 2005-09. However, contextual details regarding existing street sweeping activities were not provided. Please provide the total number of curb-miles for each municipality, the number of curb-miles that are swept on a regular basis, and the

frequency of street sweeping activities. In addition, please indicate what will be done for the remaining un-swept curb-miles and a specific schedule for full implementation of the updated street sweeping program.

6. Section 5.2.2.4 of the draft CBRP describes development of a Residential Program to evaluate irrigation and water conservation practices. However, specific goals and objectives for the program were not provided. Please provide specific numeric goals and objectives for the irrigation and conservation practices described in the CBRP. In addition, the draft CBRP discusses landscape irrigation audits; however, it does not include evaluating the outcome of such audits or applying the results to the implementation of specific management measures. Since the draft CBRP states that irrigation audits are highly effective, the permittees should identify a specific commitment to follow up on irrigation audits.

7. Section 5.2.2.6 of the draft CBRP describes development of a septic system inventory and program. However, specific details for this program were not provided. Please provide a schedule for completion of the septic system inventory and mapping tasks. In addition, please indicate how public education and its effectiveness regarding septic systems will be measured. Also, please indicate goals and objectives for septic system inspections (e.g., describe how many septic system inspections will be completed per given time period, specific steps of the inspection process, etc.).

8. Section 5.2.3 of the draft CBRP attempts to address the requirement to include the specific inspection criteria used to identify and manage urban sources of bacterial indicators. However, the information provided does not clearly describe the inspection criteria or specific details of the inspection program. Please indicate the following regarding the inspection program:

   A. The questions that will be answered by performance of inspections and controllability assessments

   B. The number of inspections that will be completed during given time periods

   C. Personnel assigned to perform inspections

   D. The specific components or steps of an inspection

   E. The criteria affecting decisions and completion of specific inspection steps

   F. Please provide additional background information regarding inspection nodes.

   G. Please explain the extent to which MS4 inspections will be able to locate transient encampments.

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9. Many actions are considered in Section 5 of the draft CBRP. This section should also include descriptions of specific activities designed to measure reductions in bacterial indicators and DWF, and identify specific reductions expected to be achieved following implementation of key CBRP elements by specific dates.

10. Section 5 of the draft CBRP should describe what additional actions will be taken to achieve TMDL targets by 2015 if the 2014 Annual Report shows that the estimated reductions in Section 6 are not being realized and/or monitoring data demonstrate that the water quality objectives and/or urban wasteload allocation is not being met.

11. The draft CBRP states that preparation of use attainability analyses (UAAs) will be included in the inspection program (pg. 5-11), that completion of UAAs will be implemented in parallel with source evaluation activities (pg. 5-11), and that UAAs are incorporated into the inspection program (pg. 5-25). Please provide clarification and specific details regarding the intent of these statements.

12. Many sections of the draft CBRP discuss hydrologic disconnection; however, hydrologic disconnection is not clearly defined. Please include a clear definition of hydrologic disconnection. Furthermore, considering that a significant portion of the compliance approach within the draft CBRP relies upon the assumption of hydrologic disconnection of water-bodies and sub-watershed areas within the MSAR watershed, the inspection strategy must include clear determinations and validation of hydrologic disconnection.

13. Section 6 contains an analysis to demonstrate the potential for the types of actions proposed in the draft CBRP to result in TMDL compliance. However, the draft CBRP does not provide requisite specifics regarding the numbers, types, locations or schedules of the actions that will actually be implemented. In short, Section 6 provides a theoretical analysis. As stated in our overarching comments, what is required of the CBRP is a specific plan and schedule for actions that will result in compliance with the urban wasteload allocation. .

14. Section 6.1 on page 6-1, the draft CBRP states that an analysis used the 5-sample/30-day Logarithmic Mean for *E. coli* and that several key questions were addressed to complete an analysis. Please identify which analysis is being addressed and describe the details of the analysis.

15. In Section 6 of the draft CBRP, discrepancies were found in reference to tables and figures in the section.

    A. On page 6-4, the draft CBRP states that typical DWF is shown in column 2 of Table 6-3, however, this column contains the Numeric Target in terms of daily bacteria load (billion cfu/day).

    B. On page 6-4, the draft CBRP states that DWF rates per acre of urbanized drainage area are depicted in column 3 of Table 6-1; however, this column actually lists sites where data are available for characterization of baseline flow and bacterial indicators.

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C. On page 6-8, the draft CBRP states that Figure 6-3 shows large amounts of unaccounted-for bacterial indicators; however, Figure 6-3 (page 6-24) depicts the probability density function of the Monte Carlo simulation.

D. Please provide units for the quantities listed in Table 6-8 Compliance Analysis Strategy.

E. In Table 6-7 (page 6-18), for the column labeled *Drainage Area with Increased Street Sweeping*, please indicate the unit for the numbers contained in the column.

16. On page 6-4 of Section 6, the draft CBRP states that the presence of a non-urban source was determined to be responsible for the elevated DWF rates. Please describe how this determination was made.

17. Alternative 2 in Section 6 is stated to be the preferred method of determining compliance. However, Figure 6-1 shows the MS4/urban DWF to be significantly smaller relative to POTW and non-urban sources and Figure 6-2 also shows unaccounted for sources that appear to be more significant than MS4 sources in at least two watershed-wide locations. The unaccounted for sources do not appear to rule out unaccounted for urban sources. This information appears to assume that the MS4 sources may not be sufficiently significant to cause receiving water impairment. Please clarify what additional data will be obtained to demonstrate whether receiving water impairment is caused by the MS4 and that would then trigger the need for any bacterial source indicator reduction by the permittees. We understood the draft CBRP to be a BMP-based implementation plan to reduce bacterial indicators from urban sources. It's not clear how this alternative will demonstrate bacterial source reduction that will lead to compliance by 2015.

18. Please correlate area-wide projected reduction in Table 6-8 to probable reduction in the WLA compared to baseline or currently known levels at the watershed-wide monitoring locations and projected necessary reduction from MS4 sources (Table 6-3). These target reductions should be included in the milestones with associated metrics in Table 7-3. Also, please describe how projected reductions will be validated.

19. The draft CBRP contains a description of proposed bacteria reduction activities that will be implemented in accordance with the schedule proposed in Section 7. In addition, the draft CBRP states in Section 7 that progress towards implementing CBRP activities will be summarized and reported in the Annual Report, which is due by November 15 of each year. Rather than summaries, please include detailed descriptions of all CBRP activities, results, and conclusions completed each year. In addition, please indicate that the Annual Report will contain a comprehensive schedule of all CBRP tasks and activities planned to be completed during the year subsequent to each Annual Report.

20. Section 8.2 (page 8-1) of the draft CBRP states that the CBRP is not intended to address bacterial indicator impairments that arise from within the impaired water-body. Please clarify the intent of this statement.

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21. In Section 3.2 (pg. 3-9) and Section 6.2.1 (pg 6.2), the draft CBRP lists general sources of DWF. Please provide a brief description of each of these sources.

22. Please include implementation timelines in the Figure 8-1 CBRP implementation strategy.

23. If determination is made that MS4 discharges are not causing or contributing to receiving water impairment, this should be determined and reported in the 2014 Annual Report to allow regional board staff to redirect its efforts prior to the 2015 compliance date.

A final version of the CBRP addressing the comments described in this letter must be submitted to the Regional Board. Per the requirements of the MS4 permit (Sec. V.D.2.b.ii), the final version CBRP must be submitted no more than 90 days after receiving these comments. If you have any questions, please contact Hope Smythe at (951) 782-4493 or hsmythe@waterboards.ca.gov or William Rice at (951) 782-4459 or wrice@waterboards.ca.gov.

Sincerely,

Kurt V. Berchtold
Executive Officer

cc: Regional Board
Dan Ilkay, San Bernardino County Flood Control District, dilkay@dpw.sbcounty.gov
Mark Norton, Santa Ana Watershed Project Authority, mnorton@sawpa.org
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ATTACHMENT B
RESPONSE TO COMMENTS

Staff believes that the preferred approach to address nutrient loads from natural background versus man-induced activities would be to first incorporate a definition of natural background into the Basin Plan. Ideally, the definition would apply to all waterbodies and watersheds within the region. The next step would be to determine whether and to what extent the Big Bear Lake watershed is consistent with that definition. Given the time likely required to conduct this effort for the entire region, staff believes that it is appropriate to begin this type of evaluation for the Big Bear Lake watershed and now proposes that language regarding the establishment of a natural background definition be added to Task 7, as shown in the revised Attachment to Resolution No. R8-2006-0023.

Although the proposed nutrient TMDL is for dry hydrological conditions only and no reductions are required for external nutrient loads at this time, the external nutrient load dischargers are required to reduce internal nutrient loads. Because external nutrient loads during wet hydrological periods are significant, it is necessary to address the nutrient runoff from the various sources that result in increased nutrients deposited to the in-lake sediments, which provide a source of internal nutrient loads. If these internal nutrient loads were not reduced, meeting the Big Bear Lake proposed numeric targets would be infeasible and water quality standards will not be attained and maintained. If new data and studies show that natural sources will not allow the present water quality standards to be attained and maintained, a Use Attainability Analysis (UAA) and/or development of new water quality objectives can be initiated. However, the proposed nutrient TMDLs address the existing water quality standards, and those standards are not being attained and maintained. Staff believes that the extended compliance schedule for the proposed Big Bear Lake Nutrient TMDLs is more than adequate to carry out studies and monitoring to better evaluate natural versus man-made or man-induced sources, as well as to define natural background. As shown in the revised Attachment to Resolution No. R8-2006-0023, compliance with the numeric targets under dry conditions, and compliance with the TMDLs for dry hydrological conditions is to be achieved by 2015; compliance with the numeric targets for other conditions is set for 2020. (Also as shown in the Attachment, staff have deleted the proposed final total phosphorus target and replaced it with the interim target and have revised the chlorophyll *a* interim target. The revised chlorophyll *a* target is based on the median or 50th percentile of observed values during the growing season in 2001 rather than the 25th percentile (see Response to Comments #34, #39, #202)).

Comment #7:
How will legacy loads, such as nutrients stored in sediment washed in Bear Valley from the surrounding mountains long before the dam was built, be accounted for?

Response:
See Response to Comment #4. The lake management plan required by the proposed implementation plan is expected to identify the mechanisms by which nutrient loads in Big Bear Lake will be managed.

Comment #8:
What is the legal distinction between water quality "goals" or "targets" differ [*sic*] from water quality "criteria" or "objectives"?

Response:
TMDLs require a quantitative numeric value or target necessary to implement existing water quality standards, which include narrative and numeric water quality objectives and beneficial uses. The numeric targets are interpretations of existing water quality standards, not water

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quality standards themselves. In a memo dated June 12, 2002, State Board legal counsel states

> "... A water quality standard defines the water quality goals of a water body by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses (40 C.F.R. § 131.2.). TMDLs, in contrast, establish numeric targets for pollutants—targets that are designed to achieve water quality standards in impaired waterbodies. TMDLs implement the existing objectives that are designed to protect designated beneficial uses and, therefore, serve as a water quality-based treatment control or strategy that necessarily rests on the established goals and balanced policy considerations embodied by water quality standards."

Comment #9:
What process would be required to change a water quality "goal" or "target?" Is EPA approval required to change a goal or target?

Response:
Changing a "goal" or "target" in a TMDL established in the Basin Plan would require an amendment of the TMDL through the Basin Plan amendment process. Regional Board, State Board, OAL and USEPA approvals would be necessary.

Comment #10:
How will the Regional Board determine what level of water quality can "reasonably be achieved through the coordinated control of all factors which affect water quality in the area" as described in Section 13241 of the California Water Code? In particular, how will "reasonability" be assessed when evaluating various control alternatives?

Response:
The proposed TMDLs are intended to achieve established water quality objectives, not to establish new objectives. Therefore, as discussed in the Response to Comment #5, Water Code Section 13241 does not apply.

That said, staff did evaluate the feasibility and "reasonability" of the proposed TMDLs, WLAs and LAs, taking into account technical, environmental and economic factors. The Big Bear Lake Nutrient TMDLs apply to dry conditions only because data were not available to support TMDLs for wet or average hydrological conditions. In dry conditions, the majority of the nutrient loads are from internal sources. Accordingly, the proposed implementation plan requires studies and monitoring to reduce these sources of nutrients instead of focusing on watershed sources. The wasteload and load allocations were based on literature and empirical research that demonstrate that the load reductions specified are feasible with the incorporation of certain lake restoration activities. No reductions are proposed for external sources because the observed data collected to date did not support reductions in watershed nutrient loads. Staff believes that the proposed TMDLs, wasteload and load allocations and numeric targets represent the conditions that can reasonably be achieved. The Basin Plan triennial review process provides the mechanism for reviewing and revising the proposed TMDLs, wasteload and load allocations and numeric targets, and the water quality standards themselves, in the event that new data and model updates demonstrate that those water quality conditions cannot reasonably be achieved (see Task 10 in the Attachment to Resolution No. R8-2006-0023).

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EXHIBIT H

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*191 F.3d 1159, *; 1999 U.S. App. LEXIS 22212, **;*
99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners, v. CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent. CITY OF TEMPE, ARIZONA; CITY OF TUCSON, ARIZONA; CITY OF MESA, ARIZONA; PIMA COUNTY, ARIZONA; and CITY OF PHOENIX, ARIZONA, Intervenors-Respondents.

No. 98-71080

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

191 F.3d 1159; 1999 U.S. App. LEXIS 22212; 99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661; 30 ELR 20116

August 11, 1999, Argued and Submitted, San Francisco, California
September 15, 1999, Filed

SUBSEQUENT HISTORY: [1]** As Amended December 7, 1999.

PRIOR HISTORY: Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

DISPOSITION: PETITION DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners appealed decision of the Environmental Appeals Board denying reconsideration of the Environmental Protection Agency's decision issuing five municipalities National Pollution Discharge System permits, without requiring numeric limitations to ensure compliance with state water-quality standards.

OVERVIEW: The Environmental Protection Agency (EPA) issued permits to municipalities without requiring limitations on storm-sewer discharges. Petitioners alleged that the Water Quality Act (WQA), 33 U.S.C.S. § 1311(b)(1)(C), required municipalities to strictly comply with state water-quality standards. Court concluded that EPA's decision was not arbitrary or capricious. Court determined that WQA unambiguously expressed Congress' intent that municipal storm-sewer discharges did not have to strictly comply with WQA. Congress expressly put in provision for industrial storm-water discharges requiring compliance with WQA, but there was no similar provision in WQA for municipal storm-sewer discharges. The plain language of WQA thus exempted municipal storm-sewer discharges from strict compliance. Court found other provisions in WQA excluded certain discharges from permit altogether. Based on that fact, court concluded exemption of municipal storm-sewer discharges from strict compliance with WQA was not so unusual that the court should not interpret the statute as written.

OUTCOME: Court denied petition for reconsideration, because Environmental Protection Agency did not act arbitrarily or capriciously in issuing permits. In examining Water Quality Act, court determined that it was Congress' specific intent to exempt municipal storm-sewer discharges from strict compliance with the statute.

CORE TERMS: municipal, water quality, storm, water-quality, industrial, pollutant, administrator, storm-sewer, strict compliance, storm-water, environmental, quotation marks omitted, unambiguously, numeric, storm sewers, practicable, dischargers, effluent, entity,

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exempt, statutory construction, engineering, capricious, stringent, maximum, runoff, Clean Water Act, decision to issue, permit requirements, ensure compliance

LEXISNEXIS(R) HEADNOTES

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation

HN1 26 U.S.C.S. § 1342(a)(1) authorizes the Environmental Protection Agency to issue National Pollution Discharge Elimination System permits, thereby allowing entities to discharge some pollutants.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review

HN2 33 U.S.C.S. § 1369(b)(1)(F) authorizes any interested person to seek review in court of an Environmental Protection Agency decision issuing or denying any permit under 26 U.S.C.S. § 1342(a)(1). Any interested person means any person that satisfies the injury-in-fact requirement for U.S. Const. art. III standing.

Environmental Law > Litigation & Administrative Proceedings > Nuisances, Trespasses & Strict Liability

HN3 A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
Environmental Law > Litigation & Administrative Proceedings > Judicial Review

HN4 The Administrative Procedures Act, 5 U.S.C.S. § 701, et seq., provides the standard of review for the Environmental Protection Agency's decision to issue a permit. Under the Administrative Procedures Act, the court generally reviews such a decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity
Administrative Law > Judicial Review > Standards of Review > General Overview
Governments > Legislation > Interpretation

HN5 The court has established a two-step process for reviewing an agency's construction of a statute it administers. Under the first step, the court employs traditional tools of statutory construction to determine whether Congress has expressed its intent unambiguously on the question before the court. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, instead, Congress has left a gap for the administrative agency to fill, the court proceeds to step two. At step two, the court must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Discharges
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations

HN6 The Clean Water Act, 33 U.S.C.S. § 1251, et seq., generally prohibits the discharge of any pollutant from a point source into the navigable waters of the United States. An entity can, however, obtain a National Pollution Discharge Elimination System permit that allows for the discharge of some pollutants.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations

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Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

HN7 A National Pollution Discharge Elimination System permit imposes effluent limitations on discharges. First, a permit-holder shall achieve effluent limitations which shall require the application of the best practicable control technology currently available. Second, a permit-holder shall achieve any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any state law or regulations.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN8 See 33 U.S.C.S. § 1342(p)(3).

Governments > Legislation > Interpretation

HN9 Questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts. Using traditional tools of statutory construction, when interpreting a statute, the court looks first to the words that Congress used. Rather than focusing just on the word or phrase at issue, the court looks to the entire statute to determine congressional intent.

Governments > Legislation > Interpretation

HN10 Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Legislation > Interpretation

HN11 The court generally refuses to interpret a statute in a way that renders a provision superfluous.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Local Governments > Licenses

HN12 The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether, and therefore from 33 U.S.C.S. § 1311. For example, the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture. 33 U.S.C.S. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. See 33 U.S.C.S. § 1342(l)(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN13 Congress gave the administrator discretion to determine what controls are necessary. Under that discretionary provision, the Environmental Protection Agency (EPA) has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which uses best management practices (BMPs) in first-round storm water permits to provide for the attainment of water quality standards.

COUNSEL: Jennifer Anderson and David Baron, Arizona Center for Law in the Public Interest,

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Phoenix, Arizona, for the petitioners.

Alan Greenberg, Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Denver, Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix, Arizona; Stephen J. Burg, Mesa City Attorney's Office, Mesa, Arizona; Timothy Harrison, Tucson City Attorney's Office, Tucson, Arizona; and Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona, for the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey, Cleveland, Ohio, for the amici curiae.

JUDGES: Before: John T. Noonan, David R. Thompson, and Susan P. Graber, Circuit Judges. Opinion by Judge Graber.

OPINION BY: SUSAN P. GRABER

OPINION

[*1161] AMENDED OPINION

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations **[**2]** to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Title HN1 26 U.S.C. § 1342(a)(1) authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

> To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the **[**3]** permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included

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programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

> The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and **[**4]** requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenors. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

[*1162] On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

[5]** JURISDICTION

HN2 Title 33 U.S.C. § 1369(b)(1)(F) authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under section 1342 of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992) [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "members of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) HN3 ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); *see also NRDC II*, 966 F.2d at 1297 ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water **[**6]** contaminants. NRDC's allegations . . . satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under Federal Rule of Civil Procedure 19. We need not consider that contention, however, because in fact Intervenors have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenors have suffered no injury.

DISCUSSION

A. *Standard of Review*

HN4 The Administrative Procedures Act (APA), 5 U.S.C. §§ 701-06, provides our standard of

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review for the EPA's decision to issue a permit. *See American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). **[**7]** *See NRDC II*, 966 F.2d at 1297 (so holding). In *Chevron*, 467 U.S. at 842-44, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996) ("The HN5 Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

[8]** **[*1163]** B. *Background*

HN6 The CWA generally prohibits the "discharge of any pollutant," 33 U.S.C. § 1311(a), from a "point source" into the navigable waters of the United States. *See* 33 U.S.C. § 1362(12)(A). An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See* 33 U.S.C. § 1342(a)(1).

HN7 Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See* 33 U.S.C. § 1342(a)(1) (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder "shall . . . achieve . . . effluent limitations . . . which shall require the application of the best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder "*shall . . . achieve . . . any more stringent limitation*, including those *necessary to meet water quality standards*, treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311 **[**9]** (b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990), the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992). *See also Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). *See* 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from **[**10]** the permit requirements of § 402 [33 U.S.C. § 1342]." *Natural Resources Defense Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977). "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." *American Mining Congress*, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. *See NRDC*

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II, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994, [1] most entities discharging storm water did not need to obtain a permit. *See* 33 U.S.C. § 1342(p).

FOOTNOTES

1 As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. *See* Pub. L. No. 102-580.

[11]** Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4, 1987," 33 U.S.C. § 1342(p)(2)(A); discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B); discharges from a "municipal separate sewer system serving a population of [100,000] or more," 33 U.S.C. § 1342(p)(2)(C) & (D); and "[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

[*1164] When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

> (A) Industrial discharges
>
> Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.
>
> (B) Municipal discharge
>
> Permits for discharges from municipal **[**12]** storm sewers -
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (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 . . . determines appropriate for the control of such pollutants.*

HN8 33 U.S.C. § 1342(p)(3) (emphasis added).

C. *Application of Chevron*

The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999) ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or **[**13]** manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 1999).

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Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress's intent unambiguously and, thus, that we must stop at step one of *Chevron*. *See, e.g.*, *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998) ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron*.") (emphasis in original); *Sierra Club v. EPA*, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*."). We agree with Intervenors and *amici*: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply **[**14]** strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

"Questions HN9 of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under *Chevron*. *NRDC II*, 966 F.2d at 1297 (citation omitted). "Using our 'traditional tools of statutory construction,' *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778, when interpreting a statute, we look first to the words that Congress used." *Zimmerman*, 170 F.3d at 1173 (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of 33 U.S.C. § 1311. *See* 33 U.S.C. § 1342(p)(3)(A) ("Permits for discharges associated with industrial activity *shall meet all applicable* **[**15]** *provisions of* this section and *section 1311* of this title.") (emphasis added). By incorporation, then, industrial **[*1165]** storm-water discharges "*shall . . . achieve . . . any more stringent limitation*, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311(b)(1)(C) (emphasis added); *see also* Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further *singled out* industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. § 1311]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal **[**16]** storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges "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 . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii).

The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, "where HN10 Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (citation and internal quotation marks omitted); *see also United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (stating the same principle), *petition for cert. filed*, No. 98-323 (Aug. 23, 1999). Applying that familiar **[**17]** and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. § 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

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storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Application of that principle is significantly strengthened here, because 33 U.S.C. § 1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) *replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers "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 . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). **[**18]** In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Indeed, the EPA's and Petitioners' interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. *See Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 634 (9th Cir. 1999) ("This HN11 court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended*, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999). Section 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges, **[*1166]** the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. HN12 The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from **[**19]** § 1311). For example, "the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See* 33 U.S.C. § 1342(l)(2). Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court's decision in *NRDC II*. There, the petitioner had argued that "the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments." *NRDC II*, 966 F.2d at 1308. This court disagreed with the petitioner's interpretation of the amendments:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the* **[**20]** *existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

Id. (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), "*Congress did not mandate a minimum standards approach.*" *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards, *see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

D. *Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

We are left with Intervenors' contention that the EPA may not, under the CWA, require strict compliance with state water-quality **[**21]** standards, through numerical limits or otherwise. We disagree.

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Although Congress did not require municipal storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress HN13 gave the administrator discretion to determine what controls are necessary. . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." 966 F.2d at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide **[**22]** for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include **[*1167]** either management practices or numeric limitations in the permits was within its discretion. *See NRDC II*, 966 F.2d at 1308 ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenors.

PETITION DENIED.

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*966 F.2d 1292, *; 1992 U.S. App. LEXIS 12517, **;*
34 ERC (BNA) 2017; 92 Cal. Daily Op. Service 4703

NATURAL RESOURCES DEFENSE COUNCIL, INC. Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, BATTERY COUNCIL INTERNATIONAL, et al., Respondents-Intervenors.

Nos. 90-70671, 91-70200

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

966 F.2d 1292; 1992 U.S. App. LEXIS 12517; 34 ERC (BNA) 2017; 92 Cal. Daily Op. Service 4703; 92 Daily Journal DAR 7542; 22 ELR 20950

October 9, 1991, Argued and Submitted, San Francisco, California
June 4, 1992, Filed

PRIOR HISTORY: [1]** Petition for Review of a Rule Promulgated by the Environmental Protection Agency.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner environmental action group challenged regulations implemented by respondent Environmental Protection Agency under § 402(l), (p) of the Clean Water Act (CWA), 33 U.S.C.S. § 1342(l), (p). Petitioner argued that those regulations, to be codified at 40 C.F.R. §§ 122.26, 122.26(e), established deadlines for a storm water discharge rule that exceeded the scope of the CWA's coverage and were otherwise unlawful.

OVERVIEW: Under amendments to the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., respondent Environmental Protection Agency promulgated rules to establish a national pollutant discharge elimination system under § 402 of the CWA, 33 U.S.C.S. § 1342. Petitioner environmental action group challenged the implementation of those rules. The court granted declaratory relief because of the importance of the interests and principles at stake, but it denied injunctive relief. The court denied petitioner's request to place all municipalities, no matter what their size, on the same permitting schedule, but it found that respondent's failure to include deadlines for permit approval or denial was arbitrary and capricious. The court upheld certain definitions and disapproved others, including the portion of the regulation regulating light industry. The use of incorporation as a factor was not arbitrary or capricious and was consistent with the CWA. The rule as to oil and gas operations and storm water control was upheld. Respondent's approval of a group application for an industrial discharger was not a rule requiring notice and comment from the public.

OUTCOME: The court granted partial relief to petitioner environmental action group in a challenge to regulations under the Clean Water Act. Declaratory relief was granted, but injunctive relief was denied. All municipalities were not placed one schedule, the lack of deadlines for permit approval was erroneous, the gas operation rules were upheld, and group application approvals did not require notice and comment.

CORE TERMS: industrial, deadline, storm, municipal, storm sewer, administrator, permit application, pollutant, medium, oil, stormwater, exemption, discharger, serving, runoff, municipality, arbitrary and capricious, regulated, site, acre, water quality, conveyance, construction sites, notice, legislative history, raw materials, issuance, statutory scheme, mining operations, declaratory

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LEXISNEXIS(R) HEADNOTES

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview

HN1 One major focus of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., is the control of point source pollution. A point source is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). The CWA also established a national pollutant discharge elimination system (NPDES), requiring permits for any discharge of pollutants from a point source pursuant to § 402 of the CWA, 33 U.S.C.S. § 1342. The CWA empowers the Environmental Protection Agency (EPA) or an authorized state to conduct an NPDES permitting program. 33 U.S.C.S. § 1342(a), (b). Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. 33 U.S.C.S. § 1342(a)(1).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN2 Congress passed the Water Quality Act, codified in scattered sections of 33 U.S.C.S., portions of which set up a new scheme for regulation of storm water runoff. Section 402(p) of the Water Quality Act establishes deadlines by which certain storm water dischargers must apply for permits. The environmental protection agency or states must act on permits and dischargers must implement their permits. The Water Quality Act also set up a moratorium on permitting requirements for most storm water discharges which ends on October 1, 1992.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN3 See 33 U.S.C.S. § 1342(p)(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN4 Section 402(p) of the Water Quality Act, codified in scattered sections of 33 U.S.C.S., outlines an incremental or phase-in approach to issuance of storm water discharge permits.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation

HN5 Section 509(b)(1) of the Clean Water Act (CWA), 33 U.S.C.S. § 1369(b)(1), describes six types of actions by the environmental protection agency administrator that are subject to review in the court of appeals. Section § 509(b)(1)(F) of the CWA, 33 U.S.C.S. § 1369(b)(1)(F), allows the court to review the issuance or denial of a permit under § 402 of the CWA, 33 U.S.C.S. § 1342. The court also has the power to review rules that regulate the underlying permit procedures.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Reviewability > Standing

Environmental Law > Water Quality > General Overview

HN6 Any interested person may seek review of designated actions of the environmental protection agency administrator under 33 U.S.C.S. § 1369(b)(1). The injury-in-fact rule for standing covers the interested person language.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

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HN7 5 U.S.C.S. § 706(2)(A) authorizes the court to set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Under this standard a court must find a rational connection between the facts found and the choice made. The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority
Governments > Federal Government > U.S. Congress
Governments > Legislation > Interpretation

HN8 On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. If legislative delegation is implicit, courts must defer to an agency's statutory interpretation as long as it is reasonable. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. Nevertheless, questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Local Governments > Licenses

HN9 The Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., calls for the Environmental Protection Agency (EPA) to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems (large systems). The CWA requires the EPA to establish regulations for permit application requirements for these two groups by February 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. 33 U.S.C.S. § 1342(p)(4)(A). Medium sized municipal separate storm sewer systems, those serving a population of 100,000 or more but less than 250,000, are on a similar schedule, except that the deadlines are two years later. 33 U.S.C.S. § 1342(4)(B).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN10 The temporary exemption under the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., for all storm water sources expires on October 1, 1992. 33 U.S.C.S. § 1342(p)(1).

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Declaratory Judgment Actions > State Judgments > Appellate Review

HN11 A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones.

Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion

HN12 The granting of declaratory relief rests in the sound discretion of the court exercised in the public interest. The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. A court declaration delineates important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Injunctive Relief

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HN13 The Environmental Protection Agency does not have the authority to ignore unambiguous deadlines set by Congress in the Clean Water Act, 33 U.S.C.S. § 1251 et seq. The deadlines are not aspirational. Congress set them and expected compliance. The court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements.

Civil Procedure > Remedies > Injunctions > Elements > General Overview

HN14 Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Local Governments > Licenses

HN15 Section 402(p)(4)(A) of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., calls for the Environmental Protection Agency to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that any such permit shall provide for compliance as expeditiously as practicable, but in no event later than three years after the date of the issuance of such permit. 33 U.S.C.S. § 1342(p)(4)(A). The CWA sets out a similar schedule for medium municipalities, except that the deadlines are two years later. 33 U.S.C.S. § 1342(p)(4)(B).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Public Improvements > General Overview

HN16 The temporary exemption under the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., for all storm water sources expires on October 1, 1992. The CWA requires the Environmental Protection Agency to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. 33 U.S.C.S. § 1342(p)(1), (6). Section 402(p)(1) of the CWA forbids requiring a permit for entities not listed as exceptions, such as small municipalities, before October 1, 1992. Yet the deadline for part one of the application for medium systems is currently May 18, 1992.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN17 Section 402(p) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., refers to municipal separate storm sewer systems serving a population of a specified size. 33 U.S.C.S. § 1342.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview
Governments > Native Americans > Authority & Jurisdiction

HN18 The 1987 amendments to the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., do not contain definitions of municipal or separate storm sewer system, but the CWA amendments enacted in 1972 defined municipality. Except as otherwise specifically provided, the term municipality means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to state law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under § 1288 of the CWA, 33 U.S.C.S. § 1288. 33 U.S.C.S. § 1362.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

HN19 An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an

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important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Administrative Law > Judicial Review > Standards of Review > General Overview
Environmental Law > Water Quality > General Overview

HN20 The court's role is not to determine whether the environmental protection agency, under the authority of the Clean Water Act, 33 U.S.C.S. § 1254 et seq., has chosen the best among all possible methods. The court can only determine if its choices are rational.

Environmental Law > Water Quality > General Overview

HN21 Under § 402(p)(2)(B) of the Clean Water Act, 33 U.S.C.S. § 1254 et seq., a discharge associated with industrial activity is an exception to the permit moratorium.

Environmental Law > Water Quality > General Overview
Governments > Legislation > Interpretation

HN22 The de minimis exemption inherent in statutory schemes to make categorical exemptions when the result is de minimis is only available where a regulation would yield a gain of trivial or no value. The de minimis concept is based on the principle that the law does not concern itself with trifling matters. Its applicability is questionable in a situation where the gains from application of the statute are being weighed against administrative burdens to the regulated community.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN23 The 1987 amendments to the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., created an exemption from the permit requirement for uncontaminated runoff from mining, oil and gas facilities. 33 U.S.C.S. § 1342(l)(2). Section 402(l)(2) of the CWA states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting precipitation runoff and which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > Owners & Operators
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN24 Under the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., reportable quantities (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which may be harmful to the public health or welfare of the United States. 33 U.S.C.S. § 1321(b)(4). The environmental protection agency has established RQs for a large number of substances, pursuant to both § 311 of the CWA, 33 U.S.C.S. § 1321, and § 102 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.S. § 9602. 40 C.F.R. §§ 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the national response center.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN25 Under the Clean Water Act, 33 U.S.C.S. § 1251 et seq., the environmental protection agency administrator has discretion to determine whether or not storm

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water runoff at an oil, gas, or mining operation is contaminated with materials. Chief are overburden, raw material, product, or process wastes and oil, grease or hazardous substances. The report sets out factors for the administrator to consider in determining contamination for the latter group of pollutants.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN26 Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water under the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. 33 U.S.C.S. § 1342(p)(3)(A), (B).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN27 See 33 U.S.C.S. § 1342(p)(3)(B).

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN28 See 5 U.S.C.S. § 551(4).

Environmental Law > Water Quality > General Overview

HN29 See 33 U.S.C.S. § 1342.

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JUDGES: Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges.Opinion by Judge Ferguson; Partial Concurrence, Partial Dissent by Judge O'Scannlain.

OPINION BY: FERGUSON

OPINION

[*1295] OPINION

FERGUSON, Circuit Judge:

The Natural Resources Defense Council ("NRDC") challenges aspects of the Environmental Protection Agency's ("EPA") recent Clean Water Act storm water discharge rule. [1] NRDC argues that the deadlines contained in the rule and the scope of its coverage are unlawful under section 402(l), (p) of the Clean Water Act, **[**3]** 33 U.S.C. § 1342(l), (p). We grant partial relief.

FOOTNOTES

1 National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (1990) (to be codified at 40 C.F.R. § 122.26); National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, 56 Fed. Reg. 12,098 (1991) (to be codified at 40 C.F.R. § 122.26(e)).

I. BACKGROUND

In 1972 Congress enacted significant amendments to the Clean Water Act ("CWA"), [2] 33 U.S.C. §§ 1251-1387 (1988), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). HN1 One major focus of the CWA is the control of "point source" pollution. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The CWA also established **[**4]** the National Pollutant Discharge Elimination System ("NPDES"), requiring permits for any discharge of pollutants from a point source pursuant to section 402 of the CWA, 33 U.S.C. § 1342. The CWA empowers EPA or an authorized state to conduct an NPDES permitting program. 33 U.S.C. § 1342(a)-(b). Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. 33 U.S.C. § 1342(a)(1).

FOOTNOTES

2 The Act is popularly known as the Clean Water Act or the Federal Water Pollution Control Act. 33 U.S.C. § 1251. For more background on the CWA, see *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-209, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976); *Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988); and *Natural Resources Defense Council v. Train*, 166 App. D.C. 312, 510 F.2d 692, 695-97 (D.C. Cir. 1975).

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This case involves runoff **[**5]** from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, 56 Fed. Reg. 56,548 (1991). One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. 55 Fed. Reg. at 47,991. [3]

FOOTNOTES

[3] The Nationwide Urban Runoff Program (NURP) conducted from 1978 through 1983 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. 55 Fed. Reg. at 47,991. A significant number of samples tested exceeded water quality criteria for one or more pollutants. *Id.* at 47,992. Urban runoff is adversely affecting 39% to 59% of the harvest-limited shellfish beds in the waters off the East Coast, West Coast and in the Gulf of Mexico. 56 Fed. Reg. at 56,548.

[6]** *A. Efforts to Regulate Storm Water Discharge.*

Following the enactment of the CWA amendments in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. *Natural Resources Defense Council v. Costle,* 186 App. D.C. 147, 568 F.2d 1369, 1372 & n.5, 1377 (D.C. Cir. 1977). NRDC **[*1296]** challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation. *Id.* at 1379. However, the court acknowledged the agency's discretion to shape permits in ways "not inconsistent with the clear terms of the Act." *Id.* at 1382.

Following this litigation, EPA promulgated regulations covering storm water discharges in 1979, 1980 and 1984. 56 Fed. Reg. 56,548. NRDC challenged various aspects of these rules both at the administrative **[**7]** level as well as in the courts.

Recognizing both the environmental threat posed by storm water runoff [4] and EPA's problems in implementing regulations, [5] HN2 Congress passed the Water Quality Act of 1987 [6] containing amendments to the CWA ("the 1987 amendments"), portions of which set up a new scheme for regulation of storm water runoff. Section 402(p), as amended, established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. *See* Appendix A. The Act also set up a moratorium on permitting requirements for most storm water discharges, which ends on October 1, 1992. There are five exceptions that are required to obtain permits before that date:

FOOTNOTES

[4] *See* 132 Cong. Rec. 32,381 (1986).

[5] Senator Stafford, speaking in favor of the conference report for the Water Quality Act, noted that "EPA should have developed this program long ago. Unfortunately, it did not. The conference substitute provides a short grace period during which EPA and the States generally may not require permits for municipal separate storm sewers." 132 Cong. Rec. 32,381 (1986). Senator Chafee stated "the Agency has been unable to move forward with a [storm water discharge control] program, because the current law did not give enough guidance to the Agency. This provision provides such guidance, and I expect EPA to move

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guidance to the Agency. This provision provides such guidance, and I expect EPA to move rapidly to implement this control program." 133 Cong. Rec. 1,264 (1987). **[**8]**

6 Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

HN3(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, . . . determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

CWA § 402(p)(2); 33 U.S.C. § 1342(p)(2).

HN4Section 402(p) also outlines an incremental or "phase-in" approach to issuance of storm water discharge permits. The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first. 133 Cong. Rec. 991 (1987). Section 402(p) requires EPA to promulgate rules regulating permit application **[**9]** procedures in a staggered fashion.

Responding to the 1987 amendments requiring the EPA to issue permit application requirements for storm water discharges associated with industrial activities and large municipalities, the EPA issued final rules on November 16, 1990, almost two years after its deadline ("the November 1990 rule"). 55 Fed. Reg. at 47,990c. EPA issued amended rules on March 21, 1991 ("the March 1991 rule"). 56 Fed. Reg. at 12,098. It is to portions of these rules that NRDC objects.

B. Jurisdiction.

We have jurisdiction pursuant to CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). HN5Section 509(b)(1) describes six types of actions by the EPA administrator that are subject to review in the court of appeals. Although the parties do not specify the section upon which they rely, § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) allows the court to review **[*1297]** the issuance or denial of a permit under CWA § 402, 33 U.S.C. § 1342. The court also has the power to review rules that regulate the underlying permit procedures. *NRDC v. EPA,* 211 App. D. C. 179, 656 F.2d 768, 775 (D.C. Cir. 1981); *cf. E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 136, 51 L. Ed. 2d 204, 97 S. Ct. 965 (1976). **[**10]** NRDC filed timely petitions for review of the final rules at issue here pursuant to CWA § 509(b)(1), 33 U.S.C. 1369(b)(1).

C. Standing.

HN6Any "interested person" may seek review of designated actions of the EPA Administrator. 33 U.S.C. § 1369(b)(1). This court has held that the injury-in-fact rule for standing of *Sierra Club v. Morton,* 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the "interested person" language. *Trustees for Alaska v. EPA,* 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v. Costle,* 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). A petitioner under *Sierra Club* must suffer adverse affects to her economic interests or "aesthetic and environmental well-being." *Sierra Club,* 405 U.S. at 734. Intervenors

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interests of "aesthetic and environmental well-being." *Sierra Club*, 405 U.S. at 734. Intervenors are various industry and trade groups subject to regulation under the rules at issue. NRDC claims, inter alia, that EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC's allegations and the potential economic impact of the rules on the intervenors satisfy the **[**11]** broad standing requirement applicable here.

II. DISCUSSION

A. Standard of Review.

HN7 5 U.S.C. § 706(2)(A) (1988) authorizes the court to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard a court must find a "rational connection between the facts found and the choice made." *Sierra Pacific Indus.*, 866 F.2d 1099, 1105 (9th Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).

HN8 On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). **[**12]** Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. *Id.* at 843-44. If legislative delegation is implicit, courts must defer to an agency's statutory interpretation as long as it is reasonable. *Id.* at 844. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. *See id.* Nevertheless, questions of congressional intent that can be answered with "traditional tools of statutory construction" are still firmly within the province of the courts. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

B. EPA's Extension of Statutory Deadlines.

1. *Background.*

NRDC challenges EPA's extension of certain statutory deadlines in the November 1990 and March 1991 rules. HN9 The statutory scheme calls for EPA to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems ("large systems"). [7] The statute required EPA to establish regulations **[*1298]** for permit application requirements for these two groups by February **[**13]** 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). Medium sized municipal separate storm sewer systems ("medium systems") (those serving a population of 100,000 or more but less than 250,000) are on a similar schedule, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(4)(B). HN10 The temporary statutory exemption for all storm water sources expires on October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA states that discharges from municipal separate storm sewer systems serving a population of under 100,000 are to be regulated after that date.

FOOTNOTES

[7] Large municipal systems are those serving a population of 250,000 or more. § 402(p)(2)(C).

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The EPA rules at issue changed the statutory deadlines as follows:

Deadlines pursuant to CWA § 402(p) [8]		**EPA Deadlines [9]**	
Discharge type	Deadline to issue rules	Deadline for application and approval of permits	Application deadlines
Industrial	2/4/89	2/4/90 - applications due	see below
		2/4/91 - approval due	
Large municipal systems	08/04/89	2/4/90 - applications due	Part 1 - 11/18/91
		2/4/91 - approval	Part 2 - 11/16/92
Medium municipal systems	08/04/91	2/4/92 - applications due	Part 1 - 5/18/92
		2/4/93 - approval due	Part 2 - 5/17/93

EPA Application Deeadlines for "Industrial Activity" Dischargers	
Individual	Group
due 11/18/91	Part 1 9 9/30/91; Part 2 - 10/1/92

FOOTNOTES

8 Since NRDC filed this action, Congress has passed certain legislation affecting some of the deadlines at issue. Congress ratified the date of September 30, 1991 for part 1 of group applications for industrial dischargers. *See* Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, § 307, 105 Stat. 130, 152 (1991).

Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") clarifies the deadlines for storm water discharges associated with industrial activity from facilities owned or operated by a municipality. Pub. L. No. 102-240, § 1068, 105 Stat. 1914, 2007 (1991). ISTEA deadlines are being reviewed in a separate case. Nothing in this opinion should be viewed as requiring EPA to comply with deadlines that have been altered or superseded by the ISTEA.

9 *See* 55 Fed. Reg. at 48,071-72 (to be codified at 40 C.F.R. § 122.26(e)); 56 Fed. Reg. at 12,100 (to be codified at 40 C.F.R. § 122.26(e)(2)(iii)). EPA changed certain of these deadlines after this case was submitted. These changes are the subject of a separate case.

The EPA rules at issue set no date for final approval or denial of applications from municipal or industrial dischargers, nor for compliance by these regulated entities. *See* 55 Fed. Reg. at 48,072.

[14]** As the chart illustrates, EPA made other elaborations on the statutory scheme in addition to extending the deadlines. Medium and large municipal systems and industrial dischargers are now subject to a two-part application process. 55 Fed. Reg. at 48,072. The November 1990 rules allow industrial dischargers to apply for either individual or group permits. *Id.*

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November 1990 rules allow industrial dischargers to apply for either individual or group permits. 55 Fed. Reg. at 48,066-67. **[*1299]** The March 1991 rules further extended the deadline for part 1 of the group industrial discharger permits to September 30, 1991. [10] 56 Fed. Reg. at 12,098. A final rule published on April 2, 1992 extended the deadline for the part 2 group application for industrial dischargers from May 18, 1992 to October 1, 1992. 57 Fed. Reg. at 11,394. The EPA rules at issue contain neither deadlines for final EPA or state approval of permits nor deadlines for compliance with the permit terms.

FOOTNOTES

[10] NRDC initially claimed that this extension was unlawful because it was granted without proper notice and comment. However, Congress approved this extended deadline in a supplemental appropriations bill. Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27 § 307, 105 Stat. 130, 152 (1991). This Act moots the procedural and substantive challenge to this extended deadline.

[15]** Seeking to compel the EPA to conform to the statutory scheme, NRDC asks this court:

a) to declare unlawful EPA's failure to issue certain of the storm water permitting regulations by February 4, 1989 and EPA's extension of certain statutory deadlines;

b) to enjoin EPA from granting future extensions of the deadlines;

c) to compel EPA to include deadlines for permit approval or denial and permit compliance consistent with the statute; and

d) to compel EPA to require that medium and small municipal systems meet the same deadlines as large systems.

2. *Discussion.*

a. Request for Declaratory Relief.

NRDC asks the court to (1) declare unlawful EPA's failure to issue storm water permitting regulations by February 4, 1989; and (2) declare unlawful EPA's extension of deadlines for submission of permit applications by large and medium systems and individual industrial dischargers.

HN11 A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones. *Public Util. Dist. No. 1 v. Bonneville Power Admin.*, 947 F.2d 386, 390 n. 1 (9th Cir. 1991) (citations omitted), *cert. denied,* **[**16]** ___U.S.___, 112 S. Ct. 1759, 118 L. Ed. 2d 422, 60 U.S.L.W. 3537 (1992). Here, the agency regulations are final. *See* 55 Fed. Reg. at 47,990, 56 Fed. Reg. at 12,096. The question of whether the EPA is bound by the statutory scheme set by Congress is a legal one. The request for declaratory relief is therefore ripe for consideration by this court.

HN12 The granting of declaratory relief "rests in the sound discretion of the [] court exercised in the public interest." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Civil Procedure* § 2759, at 645 (1983). The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. *McGraw Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.) (citing Borchard, *Declaratory Judgments* 299 (2d ed. 1941)), *cert. denied,* 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966). A court declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." **[**17]** *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). Because of the importance of the interests and the

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Brown, 738 F.2d 1462, 1471 (9th Cir. 1984). Because of the importance of the interests and the principles at stake, we grant declaratory relief.

HN13 EPA does not have the authority to ignore unambiguous deadlines set by Congress. *Delaney v. EPA,* 898 F.2d 687, 691 (9th Cir.), *cert. denied,* 111 S. Ct. 556, 112 L. Ed. 2d 563 (1990). In arguing against injunctive relief, EPA points to cases recognizing factors indicating that equitable relief may be inappropriate. *See, e.g., In re Barr Laboratories, Inc.,* 289 App. D.C. 187, 930 F.2d 72, 74 (D.C. Cir.) (agency's choice of priorities is an important factor in considering whether to grant equitable relief), *cert. denied*, 116 L. Ed. 2d 241, 112 S. Ct. 297, 112 S. Ct. 298 (1991); *Natural Resources Defense Council v. Train,* 166 App. D.C. 312, 510 F.2d 692, 712 (D.C. Cir. 1975) (court may need to give **[*1300]** agency some leeway due to budgetary commitments or technological problems); *Environmental Defense Fund v. Thomas,* 627 F. Supp. 566, 569-70 (D.D.C. 1986) (EPA's good faith is a factor). None of these factors militates against an award of declaratory relief. They do not grant an executive **[**18]** agency the authority to bypass explicit congressional deadlines. The deadlines are not aspirational - Congress set them and expected compliance. *See* 132 Cong. Rec. 32,381-82 (remarks of Senator Stafford, commenting on EPA delay and the establishment of statutory deadlines as "outside dates.") This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements. For these reasons, we grant NRDC's request for declaratory relief. EPA's failure to abide by the statutory deadlines is unlawful.

b. Request for Injunction.

NRDC asks the Court to enjoin the EPA from further extensions for permit applications from municipal and industrial dischargers. HN14 Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2942, at 365, 368-69 (1973). We decline to enjoin the EPA on discretionary grounds.

Injunctive relief could involve extraordinary supervision by this court. Injunctive relief may be inappropriate where it requires constant supervision. *Id.* at 376. At issue are deadlines for the three major **[**19]** categories of dischargers, each of which has a two-part application. The permitting process will go on for several years. While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.

In this situation, we must operate on the assumption that an agency will follow the dictates of Congress and the court. As noted above, the EPA does not have the authority to predicate future rules or deadlines in disagreement with this opinion. *See Allegheny General Hosp. v. NLRB,* 608 F.2d 965, 970 (3rd Cir. 1979). We presume that the EPA will duly perform its statutory duties. *See Upholstered Furniture Action Council v. California Bureau of Home Furnishings*, 442 F. Supp. 565, 568 (E.D. Cal. 1977) (three judge court). Because we decline to take on potentially extensive supervision of the EPA, Congress may need to find other ways to ensure compliance if the agency is recalcitrant.

c. Deadlines for Permit Approval and Compliance.

NRDC requests that the court compel EPA to revise the rules to include deadlines for permit approval or denial and permit compliance consistent with the statute. HN15 Section **[**20]** 402(p)(4)(A) calls for the EPA to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that "any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of the issuance of such permit." CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). The statute sets out a similar schedule for medium municipalities, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(p)(4)(B).

The regulations promulgated by the EPA contain neither final approval deadlines nor compliance deadlines for industrial dischargers or medium and large municipalities. 55 Fed. Reg. at 48,072. By

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failing to regulate final approval and compliance, EPA has omitted a key component of the statutory scheme. To ensure adherence to the statutory time frame, especially in the face of deadlines already missed, the regulated community must be informed of these deadlines. EPA's failure to include these important deadlines is an arbitrary and capricious exercise of its responsibility to issue regulations pursuant to the statute.

[21]** We see no need for additional delay while supplemental regulations are issued. Given the extraordinary delays already encountered, EPA must avoid further delay. **[*1301]** The regulations should inform the regulated community of the statute's outside dates for compliance. [11] *See* CWA § 402(p)(4)(A)-(B), 33 U.S.C. § 1342(p)(4)(A)-(b).

FOOTNOTES

11 In addition, pursuant to the statute, compliance deadlines applicable to each facility shall be contained in its permit.

d. Timeline for Small and Medium Systems.

The parties disagree on when small systems (those serving a population of less than 100,000) should be regulated. As noted above, HN16 the temporary statutory exemption for all storm water sources expires on October 1, 1992. The statute requires EPA to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. CWA § 401(p)(1), (6), 33 U.S.C. § 1342(p)(1), (6).

Pointing to a perceived statutory gap, NRDC argues that small systems should be subject to the same permitting **[**22]** schedule applicable to medium systems, to assure that they are regulated when the permitting moratorium ends on October 1, 1992. However, the plain language of the statute prohibits this. Section 402(p)(1) forbids requiring a permit for entities not listed as exceptions (such as small municipalities) before October 1, 1992. Yet the deadline for part 1 of the application for medium systems is currently May 18, 1992. 55 Fed. Reg. at 48,072.

Even if NRDC is correct that EPA is not proceeding so that regulations will be in place on October 1, 1992, we cannot ignore the plain language of the statute by adopting NRDC's solution. The CWA does not require regulation of such systems prior to expiration of the moratorium. We therefore reject NRDC's proposal that small systems be put on the same schedule as medium ones.

NRDC asks the court to put the medium systems on the same schedule as the large systems, in order to achieve closer compliance with the timeline set out in § 402(p)(4)(B). However, EPA's current schedule for medium systems, although delayed, is still within the statutory scheme in its relation to the schedule for large systems. That is, Congress placed the medium **[**23]** systems on a staggered permitting schedule to start two years after the large systems and industrial users. The EPA schedule now has medium municipal system applications due six months after the applications for the large municipal systems. 55 Fed. Reg. at 48,072. For this reason, the current deadline for medium municipalities does not appear to be unreasonable despite the unlawful delay.

C. Exclusion of Certain Sources from Regulation.

1. *Definition of "Municipal Separate Storm Sewer System."*

HN17 Section 402(p) refers to "municipal separate storm sewer systems serving a population" of a specified size. CWA § 402(p)(2)(C), (D), 33 U.S.C. § 1342 §§ 402(p)(2)(C), (D). NRDC contends that EPA's definition of this term violates the plain language of the statute, fails to take into account the statutory definition of the word "municipality" and is arbitrary and capricious because

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the agency considered improper factors when it defined the term. All of this, according to NRDC, results in an impermissible narrowing of the municipalities covered by the first two rounds of permitting.

HN18 The 1987 amendments to the CWA did not contain definitions of "municipal" or "separate storm **[**24]** sewer system," but the CWA amendments enacted in 1972 defined "municipality" as follows:

except as otherwise specifically provided, when used in this chapter:. . . . (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved **[*1302]** management agency under section 1288 of this title [33 U.S.C. § 1288].

33 U.S.C. § 1362.

In the November 1990 regulations, the EPA defined "municipal separate storm sewer" as: "a conveyance or system of conveyances . . . owned or operated by a State, city, town, borough, county, parish, district, association or other public body. . . ." 55 Fed. Reg. at 48,065 (to be codified at 40 C.F.R. § 122.26(b)(8)). This definition echoes the language of 33 U.S.C. § 1362(4). However, when defining large and medium municipal separate storm sewer *systems serving a population* of a specified size, EPA brought in other factors. 55 Fed. Reg. at 48,064 (to be codified **[**25]** at 40 C.F.R. § 122.26(b)(4), (7)). EPA defines medium and large separate storm sewer systems using two main categories:

1) separate storm sewer systems located in an incorporated place with the requisite population, and

2) separate storm sewer systems located in unincorporated, urbanized portions of counties containing the requisite population (as listed in Appendices H and I to the rule), excluding those municipal separate sewers located in incorporated places, townships or towns within such counties. [12] 55 Fed. Reg. at 48,064. NRDC opposes this definition for municipal separate storm sewer systems for the reasons explained below.

FOOTNOTES

[12] The rule also permits the Administrator to include certain other systems as part of a medium or large system due to the physical interconnections between the systems, their locations, or certain other factors. *See* 40 C.F.R. § 122.26(b)(4)(iii), (iv) and (b)(7)(iii), (iv).

First, NRDC argues that according to the definitional section cited above and principles of **[**26]** statutory construction, general definitions apply wherever the defined term appears elsewhere in the law. *See* 33 U.S.C. § 1362 ("except as otherwise specifically provided" the definitions apply throughout the act); *Sierra Club v. Clark,* 755 F.2d 608, 613 (8th Cir. 1985). NRDC argues that the scope of the statutory definition of "municipality" in 33 U.S.C. § 1362(4) and the scope of the phrase "municipal separate storm sewer system serving a population" are the same. NRDC thus proposes that the correct definition is a system of conveyances owned or operated by the full range of entities described at 33 U.S.C. § 1362(4), (cities, towns, etc.) with populations within the ranges designated at § 402(p)(2), i.e., 250,000 or more for large systems and between 100,000 and 250,000 for medium systems.

However, we do not believe that the entire phrase used in the act, "municipal separate storm sewer system serving a population of [a specified size]" can be equated with the term "municipality" in the manner that NRDC proposes. The act contains no definition of either "system" or "serving a population." The word "system" is particularly ambiguous in the context of

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of serving a population." The word "system" is particularly ambiguous in the context of storm **[**27]** sewers. [13] We therefore agree with EPA that there is no single, plain meaning for the disputed words.

FOOTNOTES

[13] Storm sewers located within the boundaries of a city might be part of a state highway system, a flood control district, or a system operated by the state or county. *See* 55 Fed. Reg. at 48,041.

Because the term is ambiguous, we must look first to whether Congress addressed the issue in another way. *See Abourezk v. Reagan,* 251 App. D.C. 355, 785 F.2d 1043, 1053 (D.C. Cir. 1986) ("if the court finds that Congress had a specific intent . . ., the court stops there and enforces that intent regardless of the agency's interpretation") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 & n. 9 (1984)), *aff'd by an equally divided court,* 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987). The legislative history is not illuminating. Although it explains that a purpose of the permitting scheme was to attack the most serious sources of discharge first, [14] **[**28]** this general goal is not helpful in discerning the specific meaning of "municipal separate storm sewer system serving a population." Without clear guidance from Congress, we turn to the agency's justifications **[*1303]** for its choices in the face of NRDC's objections.

FOOTNOTES

[14] *See, e.g.,* 133 Cong. Rec. 991 (1987) (statement of Rep. Stangeland).

NRDC claims that EPA's definition is arbitrary and capricious because EPA considered improper factors, including its own work load, the incorporation status of municipalities, and urban density. "*HN19*An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.,* 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). **[**29]**

EPA's final definition took into account many issues and concerns of the regulated community. *See* 55 Fed. Reg. at 48,039. EPA considered eight different options for defining large and medium municipal separate storm sewer systems. 55 Fed. Reg. at 48,038-43. EPA considered focusing on ownership or operation of a system by an incorporated place, but found that this approach did not take into account systems operated by flood control districts, state transportation systems, or concerns relating to watershed management. It instead fashioned a multi-faceted approach. This choice of approach is not unreasonable.

NRDC challenges EPA's consideration of incorporation as a factor. It claims that limiting regulation to incorporated places of the appropriate size excludes portions of 378 counties that contain over 100,000 people. NRDC essentially contends that because counties are a type of municipality, storm water conveyances in all counties with populations over 100,000 should come within the definition of either medium or large municipal separate storm sewer systems. We have already rejected NRDC's claim that the definition of regulated "systems" must include **[**30]** conveyances in all "municipalities."

EPA's use of incorporation as a factor is not arbitrary and capricious or inconsistent with the statute. The agency proceeded on the reasonable assumption that cities possess the police powers needed effectively to control land use within their borders. See 55 Fed. Reg. at 48,039

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powers needed effectively to control land use within their borders. See 55 Fed. Reg. at 48,037,

48,043. The first major category within the definition of regulated "systems," municipal separate storm sewers located within incorporated places having the requisite population, is reasonable.

NRDC questions EPA's second major category, which covers storm sewers located in unincorporated urbanized areas of counties with the designated population, but excludes conveyances located in incorporated places with populations under 100,000 within those counties. The exclusion, however, has a legitimate statutory basis. The statute prohibits EPA from requiring permits for systems serving under 100,000 persons prior to October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA reasonably concluded that conveyances within small incorporated places should be considered parts of small systems limited to those incorporated places, rather than parts of larger **[**31]** systems serving whole counties. EPA's definition attempts to capture population centers of over 100,000 (by including urbanized, unincorporated areas) without violating the congressional stricture against regulation of areas with populations under 100,000 (thus excluding incorporated areas of less than 100,000 within a county).

In arriving at its definition of "municipal separate storm sewer systems serving" a designated population, EPA investigated numerous options and considered comments from a range of viewpoints. We find "a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

NRDC objects to EPA's use of 1980 census data and EPA's definition of urban density. While it appears that NRDC has solid arguments as to why it would be preferable to use 1990 census figures and adopt its method of determining urban density, HN20 our role is not to determine whether EPA has chosen the best among all possible **[*1304]** methods. We can only determine if its choices are rational. EPA chose the 1980 census data because it was the most widely available decennial census data at the time of rule formulation and promulgation. Neither **[**32]** this choice nor its use of the Census Bureau's definition of urbanized area is arbitrary and capricious.

EPA took agency work load into account in arriving at its definition. 55 Fed. Reg. at 48,039. NRDC objects on the basis that Congress considered the issue of work load when it developed the "phase-in" approach and allowed permit applications on a system- or jurisdiction-wide basis. However, this broad congressional scheme does not prohibit further consideration of EPA's work load as one among many factors in its attempt to fashion a workable program.

In summary, NRDC's argument that the phrase "municipal separate storm sewer system serving a population" has the plain meaning NRDC proposes is not persuasive. Although EPA's definition in the face of the statute's ambiguity is complex, if not convoluted, it is not arbitrary and capricious, and we therefore reject NRDC's request that the definition be declared invalid.

2. *EPA Exemption for Light Industry*.

NRDC challenges the portion of the EPA rule excluding various types of "light industry" from the definition of "discharge associated with industrial activity."

HN21 Under CWA § 402(p)(2)(B), a "discharge associated with **[**33]** industrial activity" is an exception to the permit moratorium. In the November rule, EPA modified the statutory scheme by drawing distinctions among light and heavy industry and considering actual exposure to industrial materials. Although the statute does not define "associated with industrial activity," the EPA definition excludes industries it considers more comparable to retail, commercial or service industries. The excluded categories are manufacturers of pharmaceuticals, paints, varnishes, lacquers, enamels, machinery, computers, electrical equipment, transportation equipment, glass products, fabrics, furniture, paper board, food processors, printers, jewelry, toys and tobacco products. 55 Fed. Reg. at 48,008. These types of facilities need apply for permits only if certain work areas or actual materials are exposed to storm water. *Id.* EPA justifies these exemptions on the assumption that most of the activity at these types of manufacturers takes place indoors,

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and that emissions from stacks, use of unhoused manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust and particles will all be minimal. 55 Fed. Reg. at 48,008c. **[**34]**

Thus, EPA considers actual exposure to certain materials or stormwater for the light industry categories, but does not consider actual exposure for the other industrial categories. After careful review of the statutory language and the record, we conclude that this distinction is impermissible.

We note that the language "discharges associated with industrial activity" is very broad. The operative word is "associated." It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legislative history: "[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 133 Cong. Rec. 985 (1987); *see also* 132 Cong. Rec. 31,968 (1986) (same). EPA argues that the words "directly related" indicate Congress's intent to require permits for only those materials that come in contact with industrial materials. **[**35]** *See* 55 Fed. Reg. at 48,007. However, the examples given - parking lots and administrative buildings - indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA's definition follows the language quoted above: "Storm water discharge associated with industrial activity means the **[*1305]** discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). EPA applies this definition differently depending on type of industry. EPA bases its regulation of industrial activity on Standard Industrial Classification ("SIC") categories. For most of the industrial SIC categories (identified at 40 C.F.R. § 122.26(b)(i-x)), the EPA definition includes all stormwater discharges from plant yards, access roads and rail lines, material handling sites, storage and disposal sites, shipping and receiving areas, and manufacturing buildings. 40 C.F.R. § 122.26(b)(14). However, for the "light industry" categories identified in 40 C.F.R. § 122.26(b)(14)(xi), stormwater must **[**36]** be actually exposed to raw materials, by-products, waste, etc., before permitting is required.

EPA justifies this difference on the ground that for "light industry," industrial activity will take place indoors, and that generation of large amounts of particles and emissions will be minimal. There is nothing in the record submitted to the Court however, which supports this assumption. *See, e.g.,* 55 Fed. Reg. at 48,008. Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about the this group of facilities is arbitrary and capricious.

In addition, by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme. The statute did set up a similar approach for oil, gas, and mining industries. However, no other classes of industrial activities are subject to the more lenient "actual exposure" test. To require actual exposure entirely shifts the burden in the permitting scheme. Most industrial **[**37]** facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs. The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.

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In conclusion, we hold that the rule for light industries is arbitrary and capricious, vacate the rule, and remand for further proceedings.

3. *Exclusion of Construction Sites of Less than Five Acres.*

NRDC challenges the exemption for construction sites of less than five acres. EPA concedes that the construction industry should be subject to storm water permitting because at a high level of intensity, construction is equivalent to other regulated industrial activities. 55 Fed. Reg. at 48,033. Construction sites can pollute with soil sediments, phosphorus, nitrogen, nutrients from **[**38]** fertilizers, pesticides, petroleum products, construction chemicals and solid wastes. *Id.* EPA states that such substances can be toxic to aquatic organisms, and affect water used for drinking and recreation. *Id.*

Following its characterization of construction sites as suitable for regulation, EPA defined its task as determining "an acreage limit [] appropriate for identifying sites that amount are (sic) to industrial activity." 55 Fed. Reg. at 48,036. EPA originally proposed regulations that exempted operations that disturb less than one acre of land and are not part of a common plan of development or sale. 55 Fed. Reg. at 48,035-36. In response to comments by the regulated community about the administrative burden presented by the regulation, EPA increased the exemption to five acres. 55 Fed. Reg. at 48,036. EPA also noted that larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites. *Id.* at 48,036. **[*1306]**

We find that EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious. EPA cites no information to support its **[**39]** perception that construction activities on less than five acres are non-industrial in nature.

EPA also claims agency power, inherent in statutory schemes, to make categorical exemptions when the result is *de minimis*. *Alabama Power Co. v. Costle,* 204 App. D.C. 51, 636 F.2d 323, 360 (D.C. Cir. 1979). However, if construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity. *See Natural Resources Defense Council, Inc. v. Costle,* 568 F.2d at 1369, 1377 (D.C. Cir. 1977) (once Congress has delineated an area that requires permits, EPA is not free to create exemptions).

Further, we find the *de minimis* principle inapplicable here. HN22The *de minimis* exemption is only available where a regulation would "yield a gain of trivial or no value." *Alabama Power Co., supra,* at 361. Because of the lack of data, we cannot know whether exempting sites of less than five acres will indeed have only a *de minimis* effect.

The *de minimis* concept is based on the principle that the law does not concern itself with trifling matters. *Id.* at 360. **[**40]** We question its applicability in a situation such as this where the gains from application of the statute are being weighed against administrative burdens to the regulated community. *See id.* at 360-361 (implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine).

Further, EPA's claim that the five-acre exemption is *de minimis* is contradicted by the admission that even small construction sites can have a significant impact on local water quality. The EPA acknowledges that "over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." 55 Fed. Reg. at 48,033. Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing. We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements, and remand for further proceedings.

4. *Exemption for oil and gas activities.*

HN23The 1987 amendments created an exemption from the permit requirement for

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uncontaminated runoff **[**41]** from mining, oil and gas facilities. *See* Appendix, CWA § 402(l)(2), 33 U.S.C. §§ 1342(l)(2). Section 402(l)(2) states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting precipitation runoff and "which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products". NRDC claims that the November 1990 rule sets up an impermissible standard for determining contamination at oil and gas facilities. The relevant portion of the rule states that at these facilities, an operator is not required to submit a permit application unless the facility has had a discharge of a reportable quantity [15] since November 1987, or contributes to a violation of a water quality standard. 55 Fed. Reg. 48,067 (to be codified at 40 C.F.R. § 122.26(c)(1)(iii)). A facility which has had a release of oil or a hazardous substance in excess of RQs since **[*1307]** 1987 must submit a permit application. *Id.*; 55 Fed. Reg. at 48,029-30.

FOOTNOTES

15 "HN24"Reportable Quantities" (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which "may be harmful to the public health or welfare of the United States." CWA § 311(b)(4), 33 U.S.C. § 1321(b)(4). EPA has established RQs for a large number of substances, pursuant to both CWA section 311, 33 U.S.C. § 1321, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 102, 42 U.S.C. § 9602. *See* 40 C.F.R. Parts 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the National Response Center. *See, e.g.,* 40 C.F.R. § 110.10.

[42]** NRDC claims that oil and gas operations should be subject to the stricter standards which apply to mining operations. [16] It also objects to EPA's use of RQs as the only test for contamination of runoff from oil and gas storm water dischargers, claiming it is inconsistent with the legislative history. We conclude that the legislative history does not support NRDC's position.

FOOTNOTES

16 Operators of mines must submit permit applications whenever storm water discharges come into contact with overburden, waste products, etc. 40 C.F.R. § 122.26(c)(1)(iv).

The conference report states:

Permits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw material, product, or process wastes. In addition, where stormwater runoff is not contaminated by contact with such materials, *as determined by the administrator,* permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater **[**43]** is "contaminated by contact with" such materials, *as established by the Administrator,* shall take into consideration whether these materials are present in such stormwater runoff in excess of reportable quantities under section 311 of the Clean Water Act . . ., or in the case of mining operations, above natural background levels.

H.R. Rep. No. 1004, 99th Cong., 2d Sess., at 151 (emphasis added).

Thus, HN25the EPA Administrator has discretion to determine whether or not storm water runoff at an oil, gas or mining operation is contaminated with two types of materials: (1) overburden, raw material, product, or process wastes and (2) oil, grease or hazardous substances. The report sets out factors for the Administrator to consider in determining contamination for the latter

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group of pollutants.

NRDC first claims that because section 402(l)(2) treats oil, gas and mining together, the EPA rule must do the same. NRDC's second objection is based on its interpretation of the language in the conference report. Because the conference report lists RQs as only one factor to be taken into consideration, NRDC insists EPA cannot make it the only factor to measure contamination for oil and gas **[**44]** facilities.

Both of these arguments must fail in light of the conference report, which gives the Administrator discretion to determine when contamination has occurred with respect to the substances listed in the statute, i.e., overburden, raw materials, waste products, etc. *See* CWA § 402(l)(2). The conference report states that the Administrator shall take certain factors into account, but the report is clear that the determination of whether storm water is contaminated is within the Administrator's discretion.

NRDC argues that the remarks of certain congressmen during congressional debate show that the mining, oil, and gas exemptions were to apply only if the discharges were entirely free of contaminants. We find these examples less persuasive than the clear language of the conference report. Moreover, in light of the discretion granted the Administrator in the conference report, we cannot say that the rule as promulgated is an arbitrary and capricious exercise of that discretion.

NRDC also contends that Congress intended that EPA consider reportable quantities only in determining if a discharge is contaminated with oil, grease, or hazardous substances. Other pollutants, according **[**45]** to NRDC, must be found to contaminate the discharge if they exceed background levels.

EPA did not, in fact, limit itself to reportable quantities in determining which oil or gas facilities must apply for a permit. The rule requires a permit for any facility which "contributes to a violation of a water quality standard." 40 C.F.R. § 122.26(c)(1)(iii)(C). This requirement addresses contamination with substances other than oil and hazardous substances. We find no support in the statute or the legislative history for NRDC's claim that, with respect **[*1308]** to these substances, levels above background must be considered "contamination." The conference report quoted above requires consideration of background levels of any pollutant only with respect to mining operations.

D. Lack of Controls for Municipal Storm Water Discharge.

NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.

HN26 Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial **[**46]** and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. CWA § 402(p)(3)(A), (B), 33 U.S.C. § 1342(p)(3)(A)-(B). HN27 The Act states that permits for discharges from municipal storm sewers:

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and

(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.*

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appropriate for the control of such pollutants.

Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (emphasis added).

NRDC charges that the EPA regulations accomplish neither of the goals above, i.e., they do not effectively prohibit non-storm water discharges nor do they require the controls described in Par. (iii), above. NRDC argues that Congress granted the moratorium precisely to give EPA the opportunity to develop **[**47]** new, substantive standards for storm water control of municipal sources and instead EPA wrote vague regulations containing no minimum criteria or performance standards. [17] However, the language in Par. (iii), above, requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. NRDC also claims that the testing requirements are inadequate because there is only limited sampling at a limited number of sites. However, we must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices. *See* 55 Fed. Reg. at 48,049.

FOOTNOTES

[17] The requirements for permit applications are set forth at 40 C.F.R. § 122.26(d). Individual NPDES permit writers (EPA or state officials) will decide whether application proposals are adequate. Applicants must submit information on source control methods and estimate the annual pollutant load reduction to be achieved from their proposed management programs, but they are not required to achieve any specified level of reduction of any pollutants. *See* 55 Fed. Reg. at 48,070-71.

[48]** NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not. We therefore reject NRDC's argument that EPA's storm water control regulations fail to comply with the statute. [18]

FOOTNOTES

[18] We base our holding on NRDC's challenge to the regulations at issue. Whether a specific permit complies with the requirements of section 402(p)(3)(B) would, of course, be another matter not controlled by this decision.

E. Lack of Notice and Comment on the Approval of Part 1 of Industrial Group Storm Water Applications.

NRDC objects to the lack of opportunity for notice and comment before EPA approval of part 1 of group applications for industrial dischargers. Each member of a proposed group must submit part 1 of the application. [19] If EPA approves part 1, only **[*1309]** a small subset of the member facilities need submit part 2 of the application. 55 Fed. Reg. at 48,072 (to **[**49]** be codified at 40 C.F.R. 122.26(e)(2)). NRDC claims that because approval of part 1 waives the requirement of filing part 2 for most members of a group, EPA's decision on part 1 is equivalent to a "rule" requiring notice and comment from the public. The issue thus presented is whether EPA's decision on a part 1 group permit application is a "rule" as defined in 5 U.S.C. § 551(4) (1988) [20] requiring public notice and opportunity to comment under 5 U.S.C. § 553 (1988), or is otherwise subject to the notice and comment requirement.

FOOTNOTES

[19] Part 1 must include the identity of the group's participants, a description of the participants' industrial activities, a list of significant materials exposed to precipitation and the

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identity of the subset of the group's members who will submit quantitative data in part 2 of the application. 55 Fed. Reg. at 48,067.

20 HN28 A rule means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4).

[50]** NRDC argues that approval or disapproval of a part 1 application requires public comment because it has "general applicability" pursuant to 5 U.S.C. § 551(4) and because it will have a "palpable effect" in that it will relieve the majority of entities in the group from submitting data in part 2 of the application. NRDC cites *NRDC v. EPA,* 683 F.2d 752 (3rd Cir. 1982) and *Council of Southern Mountains, Inc. v. Donovan,* 209 App. D.C. 318, 653 F.2d 573 (D.C. Cir. 1981) in support of its argument. Both cases involved the postponement of regulations. *See NRDC,* 683 F.2d at 753-54, 764 (indefinite postponement of effective date of final amendments to regulations dealing with the discharge of toxic pollutants requires notice and comment because it has a substantial impact on the public and the industry); *Council of Southern Mountains, Inc.,* 653 F.2d at 575, 580 n. 28 (deferral of implementation of regulations requiring coal operators to supply life-saving equipment ordinarily would require notice and comment because it has a "palpable effect" upon the industry and the public).

We find these cases to be distinguishable. Both involve **[**51]** the postponement of rules of general applicability to an entire industry, or to a large class of pollutants. In contrast, although the part 1 application process will relieve some entities from the need to furnish further data, the decision is specific to a particular permit application and approval of a preliminary application will not implement, interpret or prescribe any general law or policy pursuant to 5 U.S.C. § 551(4). Rulemaking ordinarily involves "broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Washington Utilities & Transportation Com'n v. Federal Communication Commission,* 513 F.2d 1142, 1160 (9th Cir. 1975), *cert. denied,* 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975). The decision to approve a part 1 permit application, although it may affect a large number of applicants, is nevertheless focused on a specific factual question: whether the application adequately designates a representative smaller group subject to the more extensive data gathering requirements in part 2 of the application *See* 55 Fed. Reg. at 48,028. Because the decision involves a discrete, factual issue, the better view **[**52]** is that it is neither a rule nor otherwise subject to the notice and comment requirement.

Because approval of a part 1 application is essentially a factual determination, we hold that EPA's group permit application process for industrial dischargers is not invalid by its failure to provide for notice and comment.

III. CONCLUSION

In summary, we grant and deny relief as follows:

1. *"Deadlines" issue*. We grant the request for declaratory relief and deny the request for injunctive relief. We deny the request to place small, medium and large municipalities on the same permitting schedule. We hold that EPA's failure to include deadlines for permit approval or denial and compliance consistent with CWA § 402(p) is arbitrary and capricious.

2. *Exclusion of Sources from Regulation*. We uphold the definition of "municipal **[*1310]** separate storm sewers serving a population." We hold that the exemption for construction sites of less than five acres is arbitrary and capricious and remand for further proceedings. Based on the record before us, we vacate that portion of the rule regulating "light industry" and remand for further proceedings.

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3. Other issues. We uphold the rule as to oil and **[**53]** gas operations and storm water control.

We further hold that EPA approval of part 1 of a group application for an industrial discharger is not a rule requiring notice and comment from the public.

Petition for Review GRANTED IN PART and DENIED IN PART.

APPENDIX A

HN29 *CWA § 402, 33 USCA § 1342*

(l) Limitation on permit requirement

. . . .

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

. . . .

(p) Municipal and industrial **[**54]** *stormwater discharges*

(1) General rule

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

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(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

[55]** *(B) Municipal discharge*

Permits for discharges from municipal storm sewers -

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(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 **[*1311]** the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but **[**56]** in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of -

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary **[**57]** to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

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(6) Regulations

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges,other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

CONCUR BY: O'SCANNLAIN (In Part)

DISSENT BY: O'SCANNLAIN (In Part)

DISSENT

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts **[**58]** I, II.A, II.C.1, II.C.4, II.E, and much of Part II.B of the majority opinion. I dissent from Part II.B.2.c, directing EPA to issue supplemental regulations. I dissent also from Parts II.C.2 and II.C.3, in which the court invalidates EPA's exclusion of storm water discharges from certain light industrial and small construction sites from the definition of "discharges associated with industrial activity." Finally, I concur in the result, but not the reasoning, of Part II.D, holding that EPA has not acted unlawfully by failing to include specific control requirements in the permit application regulations.

[*1312] I

The majority holds that EPA has violated statutory requirements by failing to set dates for approval of, and compliance with, permits as part of its permit application program. *Ante* at 6206. Despite the holding in Part II.B.2.b that injunctive relief is inappropriate (with which I agree), the majority in Part II.B.2.c orders EPA to issue supplemental regulations setting such deadlines immediately.

I am not convinced that the statute requires EPA to set these deadlines as part of the permit application process. The provision at issue reads, in relevant part:

(4) Permit application **[**59]** requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)

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(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously **[**60]** as practicable, but in no event later than 3 years after the date of issuance of such permit.

CWA § 402(p)(4); 33 U.S.C. § 1342(p)(4) (1988).

While the statute establishes a time line EPA must follow, it does not, in my view, require that EPA include the deadline for permit approval in the permit application regulations. I agree that, given EPA's past delays and the fact that the statutory dates for issuance or denial of permits are now long past, it is appropriate for this court to declare that the statute requires EPA to issue or deny permits within one year of the application deadline. I do not, however, see that any purpose is served by requiring EPA to issue supplemental regulations setting out these deadlines, and I doubt our authority to do so.

With respect to compliance deadlines, the statute contemplates that such deadlines will be set in individual permits as they are issued. *See* CWA § 402(p)(4)(A), (B) ("Any such permit shall provide for compliance. . . ."). Each permit must contain a compliance deadline, which may not exceed three years from the date of issuance. Nothing in the statute requires EPA to establish compliance deadlines now, before any permits have **[**61]** been issued. Accordingly, in my view, NRDC's challenge to the lack of compliance deadlines in EPA's current regulations is premature. I therefore dissent from Part II.B.2.c of the majority opinion.

II

I dissent also from Parts II.C.2 and II.C.3. In my view, EPA's definition of "discharge associated with industrial activity" is a reasonable construction of an ambiguous statute, entitled to deference. While my colleagues acknowledge that we may not overturn an agency rule that represents a "permissible construction" of a statute, *ante* at 6200 (quoting *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)), they fail to apply that axiom.

A

EPA's rule excludes from the permitting requirement certain light industry facilities at which "areas where material handling equipment or activities, raw materials, intermediate **[*1313]** products, final products, waste materials, byproducts, or industrial machinery" are not exposed to storm water. *See* 40 C.F.R. § 122.26(b)(14). EPA determined that discharges from such facilities do not fall within the definition of "discharges associated with industrial activity." In my view, this determination was reasonable.

The majority concedes **[**62]** that the statute does not define "discharge associated with industrial activity." *Ante* at 6213. The operative phrase, as my colleagues note, is "associated with." *See id.* For purposes of evaluating the light industry exemption, I concede that manufacturing falls within the generally accepted meaning of "industrial activity," and that many of the facilities exempted by the EPA rule are manufacturers. Nonetheless, that concession does not compel the conclusion that discharges from such facilities are "associated with industrial activity."

The majority concludes, without explanation, that the phrase "discharges associated with industrial activity" is "very broad." *Ante* at 6214. Neither the plain meaning of the term "associated" nor the legislative history of the statute support this conclusion. "Associated with" means closely related to or connected with. *See Webster's Ninth New Collegiate Dictionary* 110 (1986). To the extent it casts any light on the subject, the legislative history supports a narrow reading of the phrase "associated with." Four members of the House, in the course of floor debates on the measure both before and after President Reagan's veto, explained **[**63]** that:

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debates on the measure both before and after President Reagan's veto, explained [L

[a] discharge is associated with industrial activity if it is *directly related to manufacturing, processing or raw materials storage areas* at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

133 Cong. Rec. 985 (1987) (statement of Rep. Hammerschmidt) (emphasis added). [1] The underscored language suggests that Congress intended to regulate only discharges directly related to certain activities at industrial facilities. EPA's interpretation, that discharges are "directly related" to these activities only if storm water may reasonably be expected to come into contact with them before its discharge, is eminently logical.

FOOTNOTES

[1] This statement was repeated verbatim by Reps. Stangeland and Snyder. 133 Cong. Rec. at 991-92; 132 Cong. Rec. at 31,959, 31,964 (1986). Rep. Rowland offered a slight variation on the theme:

One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include [sic] those from parking lots and administrative areas and employee buildings.

132 Cong. Rec. at 31,968. Rep. Rowland apparently misspoke; he probably meant, like the other legislators who addressed the topic, to say "such discharges *do not* include" those from parking lots.

[64]** The majority opinion interprets the exclusion of parking lots as an expression of congressional intent "to exclude only those facilities or parts of a facility that are completely non-industrial." *Ante* at 6215. My colleagues' reliance on the second sentence of the statement quoted above to establish this intent, however, is misplaced. The sentence relied on cannot assist us in our search for the meaning of "associated with" because it employs that very term. Moreover, it does not pretend to establish an exhaustive list of areas excluded from regulation. Legislators listed discharges from parking lots and administrative and employee buildings as *among those* not directly related to industrial activity; no one suggested that *only* discharges associated with those structures were to be excluded.

EPA's definition is consistent with the plain words of the statute and, to the extent any intent is discernible, the congressional intent. EPA has defined the term "storm water discharge associated with industrial activity" to cover only those discharges reasonably expected to come into contact with industrial activities. A large number of facilities automatically fall within EPA's **[**65]** definition and are required to **[*1314]** apply for permits. Because facilities falling within certain specified classifications under the Standard Industrial Classification manual generally conduct their operations entirely indoors, minimizing the likelihood of contact with storm water, EPA has not automatically included them within the regulations. However, these facilities *are* required to apply for permits if "areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, byproducts, or industrial machinery at these facilities are exposed to storm water." 40 C.F.R. § 122.26(b)(14). If a storm water discharge is in fact directly related to or associated with the industrial activity carried on at a facility falling within the light industry category, the facility must obtain a permit. [2]

FOOTNOTES

[2] Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the

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2 Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the record, *ante* at 6215, that industrial activities at this category of facilities will take place largely indoors. Where the assumption does not hold true, the permit requirement applies with full force. I also note that NRDC has pointed us to no evidence undermining EPA's assumption.

Unlike my colleagues, I decline to assume that EPA will not carry out its responsibility to identify and to require permits of facilities where industrial activities are in fact exposed to storm water, or that such facilities will ignore their statutory duty to apply for permits. Should that occur, a lawsuit challenging EPA's failure to enforce its regulations might well be in order. An unsubstantiated suspicion that EPA may not vigorously enforce its regulations, however, does not make those regulations arbitrary or capricious.

[66]** In my view, the statute's treatment of oil and gas facilities supports EPA's reading of the term "associated with industrial activity." Congress specifically exempted from the permit requirement discharges from oil and gas facilities and mining operations which have not come in contact with raw materials, finished products, or waste products. CWA § 402(l)(2). This section indicates a congressional intent to exempt uncontaminated discharges which have not come into contact with "industrial activities" from regulation. For oil, gas, and mining operations, Congress in this section supplied a specific, and quite limited, definition of "industrial activities." For other facilities, that definition was left to the discretion of EPA, which has adopted a much broader definition, encompassing contact with such things as industrial machinery and materials handling equipment. *See* 40 C.F.R. § 122.26(b)(14).

I do not mean to suggest that the majority's construction of the statute is untenable. It may even be preferable to the reading chosen by the agency. Nonetheless, in my view the statute is ambiguous and the legislative history does not demonstrate any clear congressional intent. The question **[**67]** before this court, therefore, is not whether "the agency construction was the only one it permissibly could have adopted" or even whether it is the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A. v. NRDC,* 467 U.S. 837, 843, n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We need only inquire if the agency's construction is a permissible one. *Id.* at 843. EPA's definition falls well within permissible bounds, and should be upheld.

B

Although the issue is closer, I also am not persuaded that EPA's exemption for construction sites under five acres should be struck down. EPA has not conceded that "construction activity is industrial in nature." *Ante* at 6217-18. In the preamble to its final rule, EPA noted that "Construction activity *at a high level of intensity is comparable to other activity that is traditionally viewed as industrial,* such as natural resource extraction." [3] 55 Fed. Reg. 48,033 (1990) (emphasis added). EPA explained that it was "attempting to focus [regulation] only on those construction activities **[*1315]** that *resemble* industrial activity." 55 Fed. Reg. at 48,035 **[**68]** (emphasis added).

FOOTNOTES

[3] EPA did admit that "even small construction sites may have a significant negative impact on water quality in localized areas," 55 Fed. Reg. at 48,033. In the absence of any indication of what EPA meant by "small," however, that statement does not undermine EPA's exemption of sites under five acres.

Neither NRDC nor the majority point to anything in the statute or the legislative history that would require the agency to define "industrial activity" as including all construction operations. Accordingly, I believe deference is due EPA's definition, provided it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A.*, 467 U.S. at 844.

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manifestly contrary to the statute. *Chevron, U.S.A.*, 467 U.S. at 844.

In trying to determine when construction should be treated as industrial activity, EPA considered a number of possible approaches. *See* 55 Fed. Reg. at 48,035. Exempting construction that would be completed within a certain designated time frame was deemed inappropriate, because the work **[**69]** could be both intensive and expansive but nonetheless take place over a short period of time. Basing the limit on quantity of soil removed was also rejected as not relating to the amount of land surface disturbed. EPA finally settled on the surface area disturbed by the construction project as a feasible and appropriate mechanism for "identifying sites that are [sic] amount to industrial activity." 55 Fed. Reg. at 48,036.

Having determined that not all construction amounts to industrial activity, and that the appropriate basis for differentiation is land area disturbed, EPA then had to determine where to draw the line. Initially, EPA proposed to exempt all construction operations disturbing less than one acre of land, as well as single family residential projects disturbing less than five acres. 53 Fed. Reg. 49,431 (1988). In the final rule, however, EPA adopted a five-acre minimum for all construction projects. 55 Fed. Reg. 48,066 (1990); 40 C.F.R. § 122.26(b)(14)(x).

Admittedly, the final rule contains little in the way of justification for treating two-acre sites differently than five-acre ones, but that does not necessarily make **[**70]** it arbitrary and capricious. Line-drawing is often difficult. NRDC was apparently willing to accept EPA's proposed one-acre/five-acre rule. Although NRDC now challenges the blanket five-acre rule, it offers no evidence that sites excluded from the permitting requirement constitute "industrial activity." In such absence of any evidence in the record undermining EPA's conclusion on an issue squarely within its expertise, I believe the rule must be upheld. [4]

FOOTNOTES

[4] Because I conclude that the rule falls within the permissible bounds of the statutory definition of "discharges associated with industrial activity," I need not consider the applicability of the *de minimis* exception.

III

Finally, while I concur in the result reached by the majority in Part II.D, rejecting NRDC's claim that EPA has unlawfully failed to require substantive controls on municipal discharges, I disagree with the majority's reasoning. In my view, NRDC's claim is premature, and we should decline to address its merits.

NRDC contends that the 1987 amendments **[**71]** require EPA to establish substantive controls for municipal storm water discharges. In support of this argument, NRDC relies on CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B), which provides:

Permits for discharges from municipal storm sewers -

* * *

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . .

This section refers only to *permits*, and says nothing about permit applications. Because EPA has yet to issue any permits, NRDC's claim on this point is premature. In the absence of any indication to the contrary, we must assume that any permit issued will comply with all applicable

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statutory requirements. The statute does not require that EPA detail the substantive controls to be imposed when establishing permit application requirements. Accordingly, I would reject NRDC's claim without **[*1316]** reaching the issue of the Administrator's discretion in selecting those controls.

IV

In sum, I join much of my colleagues' opinion. However, I would not require EPA to issue supplemental regulations detailing the time line for **[**72]** issuance of and compliance with permits, and I would uphold EPA's definition of "discharge associated with industrial activity." Finally, I would reject NRDC's claim that EPA is required to detail control measures in the permit application regulations on the grounds that the statute requires control measures only in the permits themselves.

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*250 F.3d 264, *; 2001 U.S. App. LEXIS 7462, **;*
52 ERC (BNA) 1321; 31 ELR 20599

D.E. RICE, Trustee for the Rice Family Living Trust; KAREN RICE, Trustee for the Rice Family Living Trust, Plaintiffs-Appellants, versus HARKEN EXPLORATION COMPANY, Defendant-Appellee.

No. 99-11229

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

250 F.3d 264; 2001 U.S. App. LEXIS 7462; 52 ERC (BNA) 1321; 31 ELR 20599

April 25, 2001, Decided

SUBSEQUENT HISTORY: [1]** Rehearing and Rehearing En Banc Denied June 14, 2001, Reported at: 2001 U.S. App. LEXIS 15970.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Texas. 2:97-CV-402. Mary Lou Robinson, US District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, trustees for a family trust, appealed from an order of the United States District Court for the Northern District of Texas granting defendant oil lessee's motion for summary judgment in part and holding that the Oil Pollution Act of 1990, 33 U.S.C.S. §§ 2701-2720, did not apply to alleged pollution of ground water. The district court remanded plaintiffs' other claims to state court.

OVERVIEW: Plaintiff trustees for a family trust that owned the surface rights to ranch property sued defendant, the oil and gas properties operator on the ranch, asserting that defendant was discharging hydrocarbons, produced brine, and other pollutants onto the property, in violation of Oil Pollution Act of 1990 (OPA), 33 U.S.C.S. §§ 2701-2720. Plaintiffs appealed the district court's determination that the term "navigable waters" excluded groundwater, and also claimed the pollution would reach a nearby river. The court of appeals relied on judicial interpretation and Congressional intent expressed with respect to the Clean Water Act, 33 U.S.C.S. § 1251 et seq., which used analogous language to the OPA. While an inland river would qualify as navigable waters, ground water did not, and the court declined to extend the reach of the statute to cover pollutants that were not directly affecting navigable waters.

OUTCOME: Summary judgment affirmed, because the clear Congressional intent of the federal statute in issue was not to govern discharges on to dry land that seeped into ground water, and there was no evidence in the record of any discharge of oil directly into any body of surface water, which would have violated the statute.

CORE TERMS: oil, creek, groundwater, navigable waters, ranch, surface waters, river, body of water, wetlands, summary judgment, contamination, ground water, contaminated, navigable, spill, legislative history, surface, stream, intermittent, adjacent, discharged, subsurface, pollution, pollutants, soil, cause of action, interstate commerce, construe, inland, pond

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LEXISNEXIS(R) HEADNOTES

Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 An appellate court reviews an order granting summary judgment de novo. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is appropriate if a non-moving party has failed to produce summary judgment evidence of facts which, if viewed in the reasonable light most favorable to that party, does not suffice to establish a viable claim. Where a proper motion for summary judgment has been made, the non-moving party, in order to avoid summary judgment, must come forward with appropriate summary judgment evidence sufficient to sustain a finding in its favor on all issues on which it would bear the burden of proof at trial.

Energy & Utilities Law > Federal Oil & Gas Leases > Alaskan Interests & Leases > General Overview
Energy & Utilities Law > Oil Industry > General Overview
Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > Liability

HN2 The Oil Pollution Act of 1990 (OPA), 33 U.S.C.S. §§ 2701-2720 imposes strict liability on parties responsible for the discharge of oil. Each responsible party for a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for the removal costs and damages specified in subsection (b) that result from such incident. 33 U.S.C.S. § 2702(a). The OPA thus concerns facilities which discharge, or pose a substantial threat to discharge, oil into or upon navigable waters, and liability under the OPA is therefore governed by the impact of such a discharge on navigable waters. The OPA and its related regulations define navigable waters to mean the waters of the United States, including the territorial sea. 33 U.S.C.S. § 2701(21); 15 C.F.R. § 990.30.

Environmental Law > Natural Resources & Public Lands > Wetlands Management
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
Environmental Law > Water Quality > Clean Water Act > Wetlands

HN3 The Supreme Court has endorsed an interpretation of "navigable waters" as used in the Clean Water Act, 33 U.S.C.S. § 1251 et seq., under which waters and wetlands need not always actually be navigable in fact to be protected.

Environmental Law > Natural Resources & Public Lands > Wetlands Management
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
Environmental Law > Water Quality > Clean Water Act > Wetlands

HN4 See 33 C.F.R. § 328.3(b) (2000).

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > General Overview
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters

HN5 Ground waters are not protected waters under the Clean Water Act, 33 U.S.C.S. § 1251 et seq.

Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview

HN6 Congress did not intend the Clean Water Act, 33 U.S.C.S. § 1251 et seq., to extend federal regulatory and enforcement authority over groundwater contamination. Rather, such authority was to be left to the states.

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COUNSEL: For D M RICE, KAREN RICE, Plaintiffs - Appellants: James H Wood, Channy Ferris Wood, The Wood Law Firm, Amarillo, TX.

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THE STATE OF TEXAS, Amicus Curiae: Thomas H Edwards, Office of the Attorney General of Texas, Austin, TX.

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, TEXAS OIL AND GAS ASSOCIATION, NORTH TEXAS OIL & GAS ASSOCIATION, Amicus Curiae: Joseph D Lonardo, John W Wilmer, Jr, Vorys, Sater, Seymour & Pease, Washington, DC.

JUDGES: Before GARWOOD, HIGGINBOTHAM, and STEWART, Circuit Judges.

OPINION BY: GARWOOD

OPINION

[*265] GARWOOD, Circuit Judge:

Plaintiffs-appellants D.E. and Karen Rice (the Rices) filed this suit against defendant-appellee Harken Exploration Company (Harken) alleging that Harken discharged oil into or upon "navigable waters" in violation of the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2720 (OPA), and also asserting several related state law claims. Harken moved for summary judgment on all claims and the district court granted its motion in part, on the ground that under the court's interpretation of the OPA and the facts alleged plaintiffs could not sustain a cause of action under the OPA. In the same order the district court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims and remanded those claims to state court. The Rices now appeal the district court's grant of summary judgment, and request that their OPA claim be remanded for trial. We affirm.

Facts and Proceedings Below

Plaintiffs D.E. Rice and Karen Rice are trustees for the **[**2]** Rice Family Living Trust. The trust owns the surface rights to the property known as Big Creek Ranch in Hutchinson County, Texas. Harken Exploration Company is a Delaware corporation with its principal place of business in Irving, Texas. The Rice Family Living Trust purchased Big Creek Ranch for $ 255,000 in 1995.

Harken owns and operates oil and gas properties pursuant to leases on Big Creek Ranch. Under these leases, Harken maintains various structures and equipment on the property for use in exploration and pumping, processing, transporting, and drilling for oil. Harken began its operations on Big Creek Ranch in January 1996. Prior to Harken's operations, the Big Creek Ranch property had been used for oil and gas production for several decades.

Big Creek is a small seasonal creek on the Rices' property. Big Creek runs across the ranch to the Canadian River, which is the southern boundary of Big Creek Ranch. The Canadian River is down gradient from Harken's oil and gas flow lines, tank batteries, and other production equipment. The Canadian River flows into the Arkansas River, which flows into the Mississippi River, which empties

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into the Gulf of Mexico. While the exact nature **[**3]** of Big Creek is unclear from the record, Harken does not dispute that the Canadian River is legally a "navigable water."

The Rices allege that Harken has discharged and continues to discharge hydrocarbons, produced brine, and other pollutants onto Big Creek Ranch and into "Big Creek," "unnamed tributaries of Big Creek" and other "independent ground and surface waters." They claim that Harken has contaminated or threatened 9,265.24 acre feet of groundwater and over ninety noncontiguous surface areas of the ranch. The plaintiffs do not allege that there has been any major event or events resulting in the discharge of oil onto Big Creek Ranch. Rather, the Rices allege that Harken damaged their land as a result of a series of smaller discharges that occurred over a considerable period of time. They allege that the cost to remediate the contamination of the soil and groundwater is $ 38,537,500.

Harken admits that there have been instances in which oil or produced brine was **[*266]** spilled or leaked from their tanks and other oil production equipment. Harken claims, however, that these discharges were of the sort that inevitably accompany any oil production operation and that in any case none **[**4]** of the discharges ever threatened "navigable waters" within the meaning of the OPA.

Harken moved for summary judgment in the district court, claiming, *inter alia*, that the OPA was not intended to cover spills of oil onto dry land that occurred hundreds of miles from any coast or shoreline. The district court essentially agreed, and held that the Rices could not sustain a cause of action under the OPA on the facts shown. The district court dismissed the Rices' related state law claims without prejudice. This appeal followed.

Discussion

HN1 We review an order granting summary judgment *de novo*. *Hernandez v. Reno*, 91 F.3d 776, 779 (5th Cir. 1996). Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate in this case if the Rices have failed to produce summary judgment evidence of facts which, if viewed in the reasonable light most favorable to the Rices, do not suffice to establish a viable OPA claim. Where, as here, a proper motion for summary judgment has been made, the non-movant, in order to avoid summary judgment, **[**5]** must come forward with appropriate summary judgment evidence sufficient to sustain a finding in its favor on all issues on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994). On all material matters at issue here the Rices would bear the burden of proof at trial.

The OPA was enacted in 1990 in response to the Exxon Valdez oil spill in Prince William Sound, Alaska, and was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry. Senate Report No. 104-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 723. HN2 The OPA imposes strict liability on parties responsible for the discharge of oil: "Each responsible party for ... a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines ... is liable for the removal costs and damages specified in subsection (b) that result from such incident. **[**6]** " [1] 33 U.S.C. § 2702(a). The OPA thus concerns facilities which discharge (or pose a substantial **[*267]** threat to discharge) oil "into or upon . . . navigable waters," and liability under the OPA is therefore governed by the impact of such a discharge on "navigable waters." The OPA and its related regulations define navigable waters to mean "the waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21); 15 C.F.R. § 990.30. The scope of the OPA is an issue of first impression for this Court.

FOOTNOTES

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[1] Removal costs incurred by an injured party are only recoverable by a private party if they are consistent with the National Contingency Plan. 33 U.S.C. § 2702(b)(1)(B). The "National Contingency Plan" refers to the responsibility of the President of the United States under 33 U.S.C. § 1321 (c) and (d) to publish a national plan for the removal of oil and hazardous substances from the waters of the United States where "a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States...." 33 U.S.C. § 1321(c)(2)(A). The purpose of the Plan is to "provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges...." *Id.* at § 1321(d)(2). Because of our resolution of this case, we do not reach the question of whether the Rices' proposed remediation is consistent with the National Contingency Plan.

[7]** The Rices argue that the district court's interpretation of the term "navigable waters" in the OPA was erroneous. They claim the court erred by refusing to apply the OPA to inland areas. [2] Since Congress used the same language in both the OPA and the Clean Water Act, [3] the Rices argue, the scope of both Acts should be similar and the OPA should apply to discharges into "waters of the United States" regardless of the distance of those waters from an ocean or similar body of water. The Rices also argue that the district court improperly excluded groundwater from "waters of the United States." Congress, the Rices claim, intended to extend its regulatory power to all waters that could affect interstate commerce when it enacted the OPA. Accordingly, the Rices would have this Court construe the OPA as imposing liability on facilities that discharge oil and related wastes into groundwater (or any other body of water) that affects interstate commerce. The Rices argue that under the proper interpretation of "navigable waters" they have a viable OPA claim since the groundwater under the ranch and the surface waters on the ranch have been impacted by Harken's discharges of oil. The Rices request **[**8]** that we remand this case to the district court for trial.

FOOTNOTES

[2] The district court appears to have construed the OPA as applying only to coastal or marine oil spills: "The Panhandle of Texas is hundreds of miles from costal waters or ocean beaches. Discharges of oil and salt water onto land in the Panhandle of Texas are not the type of oil and waste-water spills targeted by the OPA. ... Plaintiffs have no Oil Pollution Act cause of action under the facts of this case." *Rice v. Harken Exploration Co.*, 89 F. Supp. 2d 820, 827 (N.D. Tex. 1999).

[3] 33 U.S.C. § 1251 *et seq.*

Although there have been few cases construing the OPA definition of "navigable waters," there is a substantial body of law interpreting that term as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA). The CWA is also limited to "navigable waters," which is defined in both statutes as "waters of the United States." *Compare* 33 U.S.C. § 2701 **[**9]** (21) *with* 33 U.S.C. § 1362(7). The House Conference Report on the OPA reads: "The terms 'navigable waters,' 'person,' and 'territorial seas' are re-stated verbatim from section 502 of the [CWA]. ... In each case, these [CWA] definitions shall have the same meaning in this legislation as they do under the [CWA] and shall be interpreted accordingly." House Conference Report No. 101-653, *reprinted in* 1990 U.S.C.C.A.N. 779, 779-80. The Senate Report is similar, and adds that the OPA is intended to cover inland waters as well: "The [OPA] covers all the bodies of water and resources covered by section 311 [of the CWA], including the inland waters of the United States...." Senate Report No. 101-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 733.

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The legislative history of the OPA and the textually identical definitions of "navigable waters" in the OPA and the CWA strongly indicate that Congress generally intended the term "navigable waters" to have the same meaning in both the OPA and the CWA. Accordingly, the existing case law interpreting the CWA is a significant **[*268]** aid in our present task of interpreting the OPA.

HN3 The Supreme Court has endorsed an interpretation **[**10]** of "navigable waters" as used in the CWA under which waters and wetlands need not always actually be navigable in fact to be protected under that Act. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 133, 106 S. Ct. 455, 462-63, 88 L. Ed. 2d 419 (1985) (upholding regulations that CWA restricts discharges into non-navigable "wetlands" adjacent to an open body of navigable water). [4] We have adopted a similarly broad interpretation of the language of the CWA. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Other courts have also adopted expansive interpretations of "navigable waters" under the CWA. *See, e.g., Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055, 88 L. Ed. 2d 769, 106 S. Ct. 791 (1986)(holding that non-navigable creeks and arroyos are covered by the CWA where intense rainfall could create surface connections with navigable streams); *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974) (holding that the CWA prohibited discharges into a non-navigable tributary three waterways removed from a navigable stream).

FOOTNOTES

[4] "Wetlands" as used in *Riverside Bayview Homes* referred to those areas described as "wetlands" in the Army Corps of Engineers regulations, 33 C.F.R. § 323.2 (1985). *Riverside Bayview Homes*, 106 S. Ct. at 458. The current Corps regulations, HN4 33 C.F.R. § 328.3(b) (2000), contain essentially the same definition,

> viz:
>
> "(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

There is no evidence nor any claim that any "wetlands" are involved in this case.

[11]** However, more recently, the Supreme Court has limited the scope of the CWA. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), the Court held that an Army Corps of Engineers regulation defining "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce" exceeded the scope of the Corps' regulatory power under the CWA as applied to the petitioner's land under a regulation known as the "Migratory Bird Rule." *See* 121 S. Ct. at 678 (quoting 33 C.F.R. § 328.3(a)(3)). The "Migratory Bird Rule" states that the CWA covers any intrastate water which could be used by migrating birds that cross state lines or which could be used to irrigate crops sold in interstate commerce. *See* 51 Fed. Reg. 41217. The case involved several ponds that had formed in pits that were originally part of a sand and **[**12]** gravel mining operation. *Solid Waste Agency*, 121 S. Ct. at 678. The Court refused to interpret the CWA as extending the EPA's regulatory power to the limits of the Commerce Clause, and held that the application of the CWA to the petitioner's land exceeded the authority granted to the Corps under the CWA. *Id.* at 684. The Court distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a

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body of open water that was actually navigable: "We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect' and went on **[*269]** to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word a limited meaning and quite another to give it no effect whatever." *Id.* at 682-83. Under *Solid Waste Agency*, it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water. *See id.* at 680 ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. **[**13]** But we conclude that the text of the statute will not allow this.")

Nevertheless, under this standard the term "navigable waters" is not limited to oceans and other very large bodies of water. If the OPA and CWA have identical regulatory scope, the district court's conclusion that the OPA cannot apply to *any* inland waters was erroneous. However, the district court's reluctance to apply an Act targeted at disasters like the Exxon Valdez oil spill to Harken's dry land operations in the Texas Panhandle is certainly understandable. Under any definition of "navigable waters" there still must be a discharge of oil into a protected body of water for liability under either statute to attach.

The Rices point to two categories of waters which, they argue, are protected under the OPA. They claim that Harken has discharged oil into Big Creek and other surface waters on the ranch, and also into the groundwater underneath the ranch. The OPA provides the Rices with a remedy only if they can demonstrate that Harken has discharged oil into any waters that are protected by the OPA. We address groundwater and surface water in turn.

Groundwater

The Rices urge this Court to apply the CWA **[**14]** definition of "navigable waters" to the OPA. But, even that definition is not so expansive as to include groundwater within the class of waters protected by the CWA. The law in this Circuit is clear that HN5 ground waters are not protected waters under the CWA. [5] *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977). In *Exxon*, we held that the legislative history of the CWA belied any intent to impose direct federal control over any phase of pollution of subsurface waters. *Id.* [6]

FOOTNOTES

5 The Seventh Circuit has reached a similar conclusion. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).

6 We based our rejection of the EPA's claim that the CWA granted it authority over discharges into deep water wells on clear evidence that congressional intent was to the contrary:

> "...the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for dealing with it. In our view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwaters for state authority that the Administrator's construction, although not unreasonable on its face, must give way because 'it is contrary to congressional intentions.'"

Exxon, 554 F.2d at 1322 (quoting *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 227, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976)).

[15]** The Rices seek to avoid a similar construction of the OPA by arguing that in enacting the OPA Congress intended to exert its power under the Commerce Clause to the fullest possible degree, and that therefore groundwater, if it affects interstate commerce, should be protected

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under the Act. But, the Rices do not point to any portion of the Act itself or to any part of the legislative history of the Act to justify their claim that Congress intended to depart from its decision not to regulate groundwater under the CWA. The Rices' **[*270]** theory would extend coverage under the OPA to waters that we have explicitly held are not covered by the CWA. *Exxon*, 554 F.2d at 1322. The Rices have presented us with no reason to construe the term "waters of the United States" more expansively in the OPA than in the CWA. We hold that subsurface waters are not "waters of the United States" under the OPA. Accordingly, the Rices have no cause of action under the OPA for discharges of oil that contaminate the groundwater under Big Creek Ranch.

Surface Water

The Rices do not confine their claims to groundwater contamination. They also allege that the Canadian River, Big Creek, and other **[**16]** surface waters on the ranch are directly threatened by Harken's discharges into the groundwater under Big Creek Ranch. There is substantial evidence of a variety of leaks and minor discharges from Harken's equipment onto the soil surrounding its Big Creek Ranch facilities. It appears from our review of the record that Harken's various discharges were all onto dry land. There is no evidence in the record of any discharge of oil directly into any body of surface water. Instead, the Rices appear to claim that Harken's discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water.

There is arguably some evidence in the record that some naturally occurring surface waters on Big Creek Ranch have actually been contaminated with oil. John Drake, the Rices' expert geologist, prepared a preliminary report on water contamination on Big Creek Ranch and was deposed by Harken. Although the report mentions surface waters, Drake's report focuses almost entirely on the impact of Harken's oil production activities on the soil and on the groundwater under Big Creek Ranch. Drake's report does state that several surface water samples were taken **[**17]** in which petroleum hydrocarbons were found. [7] But, the presence of oil does not grant jurisdiction under the Act. Instead, a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water.

FOOTNOTES

[7] Drake's report states:

> "In order to more accurately characterize the site, surface water where present was sampled and analyzed using standard EPA protocol. In all thirteen (13) surface water samples were collected from various surface locations across the site. These samples consisted of four (4) spring, five (5) stock pond, one (1) stormwater, and three (3) stream locations. Several of the surface water samples showed impact by hydrocarbons...."

This statement appears to be consistent with a table, attached to the Rices' motion opposing summary judgment, that summarizes the water samples taken on Big Creek Ranch, although the information provided in that table is somewhat cryptic. It is unclear from the report exactly which samples were taken from naturally occurring surface waters and which were taken from excavated trenches or wells. We are also unsure from the record of the level of impact hydrocarbons have had on the surface waters described in the report.

[18]** The bodies of water the Rices seek to protect are consistently referred to in the record as intermittent streams which only infrequently contain running water. There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself. It is described several times in various depositions as a "seasonal creek" that often has no running water at all. And, apparently, some of the time that water does flow in it, all the water is underground. There is no detailed information

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the time that water does flow in it, all the water is underground. There is no detailed information about how often the creek runs, about how much water flows through it **[*271]** when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA. And, as noted, there is no evidence of any oil discharge directly into Big Creek or any other intermittent creek containing above ground water on the ranch; only that there were **[**19]** oil discharges into the ground, some part of which may have, over some undetermined period of time, seeped through the ground into ground water and thence into Big Creek or other intermittent creek (either as an underground or surface body of water).

Although Big Creek and the other intermittent streams located on the ranch do not qualify as "navigable waters," the Rices also allege that the Canadian River is directly threatened by Harken's discharges of oil. The parties agree that the Canadian River is a "navigable water" within the meaning of the OPA. The river is allegedly threatened with contamination by Harken's operations through subsurface flow from the contaminated groundwater under the ranch into the river.

This Court has not yet decided whether discharges into groundwater that migrate into protected surface waters are covered under either the CWA or the OPA. In *Exxon*, we held that the text and legislative history of the CWA "belied an intention to impose direct federal control over any phase of pollution of subsurface waters." *Exxon*, 554 F.2d at 1322. But, in that case the EPA did not argue that the pollutants at issue would migrate from ground water **[**20]** into surface waters and we expressed "no opinion on what the result would be if that were the state of facts." *Id.* at 1312 n. 1. We have therefore not yet addressed whether discharges into groundwater may be actionable under the CWA or OPA if those discharges result in the contamination of some body of protected surface water.

So far as here relevant, the "discharges" for which the OPA imposes liability are those "into or upon the navigable waters." As noted, "navigable waters" do not include groundwater. It would be an unwarranted expansion of the OPA to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a "discharge" "into or upon the navigable waters." [8]

FOOTNOTES

[8] The Seventh Circuit has also concluded that the CWA does not assert authority over ground water simply because those waters may be hydrologically connected to protected surface waters. *Village of Oconomowoc Lake*, 24 F.3d at 965. In *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985), the court held that a CWA claim was not stated by a complaint which alleged "that the pollutants released into the ground at the Air Station not only contaminated the ground water, but are naturally discharging into the Grand Traverse Bay-an undisputed navigable body of water." *Id.* at 1106. In so holding the court relied on our opinion in *Exxon* as well as its own similar reading of the CWA legislative history. Expressly addressing footnote 1 of our *Exxon* opinion the court stated (618 F. Supp. at 1106-07):

> "The Fifth Circuit did not concede that discharges into the soil will be subject to the regulatory provisions of CWA if the groundwater contaminated thereby eventually migrates into navigable waters. On the contrary, it specifically 'expressed no opinion on what the result would be [under the CWA] if that were the state of facts.' *Exxon*, 554 F.2d at 1312 n.1. Moreover, the remainder of the *Exxon* opinion and the unmistakably clear legislative history both demonstrate that HN6 Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination. Rather, such authority was to be left to the states."

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Kelly and *Exxon* are both relied on in this respect by *Village of Oconomuwoc Lake*. *Village of Oconomuwoc Lake,* 24 F.3d at 965.

[21]** In *Exxon*, we noted that Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA. *Exxon*, 554 F.2d at 1325. **[*272]** The issue in *Exxon* was whether the EPA, as an incident to its power under the CWA to issue permits authorizing the discharge of pollutants into protected surface waters, [9] had the authority to place conditions in such permits that regulated the disposal of pollutants into deep wells. We concluded that EPA did not have that authority, basing that holding on our reading of the statute as well as a detailed examination of the legislative history of the CWA, which we held "demonstrated conclusively that Congress believed it was not granting the [EPA] any power to control disposals into groundwater." *Id.* at 1329.

FOOTNOTES

[9] *See* 33 U.S.C. § 1344(a).

In light of Congress's decision not to regulate ground waters under the CWA/OPA, we are reluctant to construe **[**22]** the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of "navigable waters." We must construe the OPA in such a way as to respect Congress's decision to leave the regulation of groundwater to the States. Accordingly, we hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA. In this connection, we also note that such a construction is entirely consistent with the occasion which prompted the Act's passage.

The Rices have offered significant evidence that the groundwater under Big Creek Ranch has been contaminated by oil discharges onto the surface of ranch land. But, the only evidence the Rices have produced of the hydrological connection between this groundwater and the Canadian River is a general assertion by their expert that the Canadian River is down gradient from Big Creek Ranch. Drake's report briefly mentions a hydrological connection between the groundwater and the Canadian River, but there is nothing **[**23]** in the report or in Drake's deposition to indicate the level of threat to, or any actual oil contamination in, the Canadian River. There is no discussion of flow rates into the river, and no estimate of when or to what extent the contaminants in the groundwater will affect the Canadian River. There is also no evidence of any present or past contamination of the Canadian River. The only evidence in the record that any protected body of water is threatened by Harken's activities is Drake's general assertion that eventually the groundwater under the ranch will enter the Canadian river. The ground water under Big Creek Ranch is, as a matter of law, not protected by the OPA. And, the Rices have failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA. Summary judgment for Harken was appropriate.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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EXHIBIT I

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33 U.S.C. § 1342(b)

(b) State permit programs
At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which -

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

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(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of

(A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,

(B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or

(C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

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33 U.S.C. § 1342(p)

(p) Municipal and industrial stormwater discharges

(1) General rule
Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions
Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges
Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge
Permits for discharges from municipal storm sewers -

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(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.

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§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

NOTE TO PARAGRAPH (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) *Large and medium municipal separate storm sewer systems.* (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges

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within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(*1*) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(*2*) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(*3*) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) *Discharges through large and medium municipal separate storm sewer systems.* In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) *Other municipal separate storm sewers.* The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) *Non-municipal separate storm sewers.* For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

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(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) *Combined sewer systems.* Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of §122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. *See* 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to §122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see §124.52(c) of this chapter).

(b) *Definitions.* (1) *Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) *Illicit discharge* means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) *Incorporated place* means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) *Large municipal separate storm sewer system* means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate

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storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4) (i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4) (i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4) (i), (ii), (iii) of this section.

(5) *Major municipal separate storm sewer outfall* (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) *Major outfall* means a major municipal separate storm sewer outfall.

(7) *Medium municipal separate storm sewer system* means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7) (i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7) (i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7) (i), (ii), (iii) of this section.

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(8) *Municipal separate storm sewer* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) *Outfall* means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) *Overburden* means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) *Runoff coefficient* means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) *Significant materials* includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) *Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) *Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this

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section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(l) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a

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part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221–25;

(15) *Storm water discharge associated with small construction activity* means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor (''R'' in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of *Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE)*, pages 21–64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C 552(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 401 M St. SW, Washington, DC 20460. A copy is also available for inspection at the U.S. EPA Water Docket , 401 M Street SW, Washington, DC 20460, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a ''total maximum daily load'' (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO § 122.26(B)(15)—SUMMARY OF COVERAGE OF ''STORM WATER DISCHARGES ASSOCIATED WITH SMALL CONSTRUCTION ACTIVITY'' UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation; Required Nationwide Coverage.	• Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres.

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EXHIBIT 1 TO § 122.26(B)(15)—SUMMARY OF COVERAGE OF "STORM WATER DISCHARGES ASSOCIATED WITH SMALL CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM—Continued

	• Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	• Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)
Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority..	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)

(16) *Small municipal separate storm sewer system* means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) *Small MS4* means a small municipal separate storm sewer system.

(18) *Municipal separate storm sewer system* means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) *MS4* means a municipal separate storm sewer system.

(20) *Uncontrolled sanitary landfill* means a landill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) *Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity*—(1) *Individual application.* Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit or any dischage of storm water which the Director is evaluating for designation (see §124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of §122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in §122.26(c)(1)(ii)–(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

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(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and nonstructural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such nonstorm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(*1*) Any pollutant limited in an effluent guideline to which the facility is subject;

(*2*) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(*3*) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(*4*) Any information on the discharge required under § 122.21(g)(7)(vi) and (vii);

(*5*) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(*6*) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

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(G) Operators of new sources or new discharges (as defined in §122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of §122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of §122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under §122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent

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or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include:

(i) *Part 1.* Part 1 of the application shall consist of:

(i) *General information.* The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) *Legal authority.* A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) *Source identification.* (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of nonstorm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(*1*) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

(*2*) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(*3*) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(*4*) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(*5*) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(*6*) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) *Discharge characterization.* (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

(*1*) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(*2*) Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(*3*) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water

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quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) *Field screening.* Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced ¼ mile apart shall be overlayed on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created,

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and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced ¼ mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) *Characterization plan.* Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (*see* paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) *Management programs.* (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) *Fiscal resources.* (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) *Part 2.* Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

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(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) *Source identification.* The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(*1*) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) *Characterization data.* When ''quantitative data'' for a pollutant are required under paragraph (d)(2)(iii)(A)(*3*) of this section, the applicant must collect a sample of effluent in accordance with 40 CFR 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(*1*) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at §122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(*2*) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(*3*) For samples collected and described under paragraphs (d)(2)(iii)(A)(*1*) and (A)(*2*) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)
Total dissolved solids (TDS)
COD
BOD_5
Oil and grease
Fecal coliform
Fecal streptococcus
pH
Total Kjeldahl nitrogen
Nitrate plus nitrite
Dissolved phosphorus
Total ammonia plus organic nitrogen
Total phosphorus

(*4*) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under §122.21(c)(7)) for BOD_5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead,

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and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(*1*) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial 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;

(*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(*3*) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(*4*) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(*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 (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

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(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated

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with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD_5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under §122.21(g)(7) (vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(*1*) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(*2*) A description of requirements for nonstructural and structural best management practices;

(*3*) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(*4*) A description of appropriate educational and training measures for construction site operators.

(v) *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) *Fiscal analysis.* For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) *Application deadlines.* Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(i) *Storm water discharges associated with industrial activity.* (i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

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(2) For any group application submitted in accordance with paragraph (e)(2) of this section:

(i) *Part 1.* (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) *Part 2.* (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submittted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) *Rejected facilities.* (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)–(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

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(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see §122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under §122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under §122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under §123.35(d)(3) (see §122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under §122.32(a)(2) (see §122.33(c)(2)).

(f) *Petitions.* (1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of

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population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) *Conditional exclusion for "no exposure" of industrial activities and materials to storm water.* Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) *Qualification.* To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to §122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

(iv) Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

(v) Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) *Industrial materials and activities not requiring storm resistant shelter.* To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) *Limitations.* (i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who

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anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) *Certification.* The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see §122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

(B) Materials or residuals on the ground or in storm water inlets from spills/leaks;

(C) Materials or products from past industrial activity;

(D) Material handling equipment (except adequately maintained vehicles);

(E) Materials or products during loading/unloading or transporting activities;

(F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

(G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

(H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;

(I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

(J) Application or disposal of process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of §122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false

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information, including the possibility of fine and imprisonment for knowing violations.''

[55 FR 48063, Nov. 16, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §122.26, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 122.27 Silvicultural activities (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

(2) *Rock crushing and gravel washing facilities* means facilities which process crushed and broken stone, gravel, and riprap (See 40 CFR part 436, subpart B, including the effluent limitations guidelines).

(3) *Log sorting and log storage facilities* means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR part 429, subpart I, including the effluent limitations guidelines).

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

(a) *Coverage.* The Director may issue a general permit in accordance with the following:

(1) *Area.* The general permit shall be written to cover one or more categories or subcategories of discharges or sludge use or disposal practices or facilities described in the permit under paragraph (a)(2)(ii) of this section, except those covered by individual permits, within a geographic area. The area should correspond to existing geographic or political boundaries such as:

(i) Designated planning areas under sections 208 and 303 of CWA;

(ii) Sewer districts or sewer authorities;

(iii) City, county, or State political boundaries;

(iv) State highway systems;

(v) Standard metropolitan statistical areas as defined by the Office of Management and Budget;

(vi) Urbanized areas as designated by the Bureau of the Census according to criteria in 30 FR 15202 (May 1, 1974); or

(vii) Any other appropriate division or combination of boundaries.

(2) *Sources.* The general permit may be written to regulate one or more categories or subcategories of discharges or sludge use or disposal practices or facilities, within the area described in paragraph (a)(1) of this section, where the sources within a covered subcategory of discharges are either:

(i) Storm water point sources; or (ii) One or more categories or subcategories of point sources other than storm water point sources, or one or more categories or subcategories of ''treatment works treating domestic sewage'', if the sources or ''treatment works treating domestic sewage'' within each category or subcategory all:

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;

(C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;

(D) Require the same or similar monitoring; and (E) In the opinion of the

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*** ISSUE OF THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART C -- PERMIT CONDITIONS

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40 CFR 122.44

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

(2) Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

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(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) Other effluent limitations and standards under sections 301, 302, 303, 307, 318 and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also § 122.41(a).

(2) Standards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) Reopener clause: For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a

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State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that adischarge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

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(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See § 122.29(c)).

(e) Technology-based controls for toxic pollutants. Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

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(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) Notification level. A "notification level" which exceeds the notification level of § 122.42(a)(1)(i), (ii) or (iii), upon a petition from the permittee or onthe Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c)

(g) Twenty-four hour reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under § 122.41(1)(6)(ii)(C) (24-hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Durations for permits, as set forth in § 122.46.

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants or another method is required under 40 CFR subchapters N or O. In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR subchapters N or O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants.

(2) Except as provided in paragraphs (i)(4) and (i)(5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas

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contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with § 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l)(1), (4), (5), and (6) at least annually.

(j) Pretreatment program for POTWs. Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

NOTE TO PARAGRAPH (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing

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Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. Copies of those documents (or directionson how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260-7786; or the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276-0462. Updates of these documents or additional BMP documents may also be available. A list of EPA BMP guidance documents is available on the OWM Home Page at http://www.epa.gov/owm. In addition, States may have BMP guidance documents.

These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(l) Reissued permits. (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions -- A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if --

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

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(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) Grants. Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) Sewage sludge. Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.59 of this chapter.

(r) Great Lakes. When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) Qualifying State, Tribal, or local programs. (1) For storm water discharges associated with small construction activity identified in § 122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local

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requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in § 122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

HISTORY:
[48 FR 14153, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 49 FR 38049, Sept. 26, 1984; 50 FR 6940, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985; 54 FR 256, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 54 FR 23895, June 2, 1989; 57 FR 11413, Apr. 2, 1992; 57 FR 33049, July 24, 1992; 60 FR 15386, Mar. 23, 1995; 64 FR 42434, 42469, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68847, Dec. 8, 1999; 65 FR 30886, 30908, May 15, 2000; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001; 66 FR 65256, 65337, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 35006, 35040, June 16, 2006; 72 FR 11200, 11212, Mar. 12, 2007]

AUTHORITY:
The Clean Water Act, 33 U.S.C. 1251 et seq.

NOTES:
[EFFECTIVE DATE NOTE: 71 FR 35006, 35040, June 16, 2006, revised paragraph (b)(3), effective July 17, 2006; 72 FR 11200, 11212, Mar. 12, 2007, revised paragraph (i)(1)(iv), effective Apr. 11, 2007.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Communities for a Better Environment v State Water Resources Control Bd. (2003, 1st Dist) 109 Cal App 4th 1089, 1 Cal Rptr 3d 76, 2003 CDOS 5149, 2003 Daily Journal DAR 6533, reh den (2003, Cal App 1st Dist) 2003 Cal App LEXIS 1082
Divers' Environmental Conservation Organization v State Water Resources Control Bd. (2006, 4th Dist) 145 Cal App 4th 246, 51 Cal Rptr 3d 497, 2006 CDOS 10951, 36 ELR 20237, reh den (2006,

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TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

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40 CFR 130.2

§ 130.2 Definitions.

(a) The Act. The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

(b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).

(f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.

(g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

(h) Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources

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of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

HISTORY:
[50 FR 1779, Jan. 11, 1985, as amended at 54 FR 14359, Apr. 11, 1989; 65 FR 43586, 43662, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
33 U.S.C. 1251 et seq.

NOTES:
NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: 73 FR 52928, Sept. 12, 2008.]

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EXHIBIT J

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*35 Cal. 4th 613, *; 108 P.3d 862, **;*
*26 Cal. Rptr. 3d 304, ***; 2005 Cal. LEXIS 3486*

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants. CITY OF LOS ANGELES, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

S119248

SUPREME COURT OF CALIFORNIA

35 Cal. 4th 613; 108 P.3d 862; 26 Cal. Rptr. 3d 304; 2005 Cal. LEXIS 3486; 60 ERC (BNA) 1470; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071

April 4, 2005, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Rehearing Extended Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005) Rehearing denied by, Request denied by City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562. City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

DISPOSITION: Judgment affirmed in part and remanded in part..

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff cities sought review of a judgment of the Court of Appeal of California, Second Appellate District, Division Three, holding that Cal. Water Code §§ 13241 and 13263 required a regional water control quality board to take into account economic considerations when it adopted water quality standards in a basin plan but not when the board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

OVERVIEW: The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. The court held that whether the regional board should have complied with Cal. Water Code §§ 13263 and 13241 of California's Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by federal law, from taking into account the economic effects of doing so.

OUTCOME: The court affirmed the judgment of the court of appeal, reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants were necessary to satisfy federal Clean Water Act requirements for treated wastewater. The court remanded for further proceedings to determine whether the pollutant

limitations in the permits met or exceeded federal standards.

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CORE TERMS: water quality, wastewater, regional boards, pollutant, Clean Water Act, effluent, federal law, basin, plant's, stringent', pollution, discharged, economic factors, narrative, federal standards, clean, Porter-Cologne Act, numeric, beneficial uses, concentration, navigable waters, regional, river, issuing, Conservation Laws, point sources, environmental, authorize, chemical, Control Act

LEXISNEXIS(R) HEADNOTES

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use

HN1 Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Cal. Water Code § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region. Cal. Water Code § 13240. The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Cal. Water Code § 13050(j). Basin plans must be consistent with state policy for water quality control. Cal. Water Code § 13240.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview

HN2 Under the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act. 33 U.S.C.S. § 1370.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

HN3 The Clean Water Act, 33 U.S.C.S. § 1251 et seq., provides for two sets of water quality measures. Effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. 33 U.S.C.S. §§ 1311, 1314. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway. 33 U.S.C.S. § 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources

HN4 See 33 U.S.C.S. § 1362(14).

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

HN5 The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the state. 33 U.S.C.S. § 1313(c).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent

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Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
HN6 Part of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. 33 U.S.C.S. § 1342(a), (b). In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. Cal. Water Code § 13374.

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
HN7 See Cal. Water Code § 13263(a).

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
HN8 See Cal. Water Code § 13241.

Governments > Legislation > Interpretation
HN9 When construing any statute, the reviewing court's task is to determine the legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
HN10 Cal. Water Code § 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in Cal. Water Code § 13241. Listed among the § 13241 factors is economic considerations. Cal. Water Code § 13241(d).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
HN11 Cal. Water Code § 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law, 33 U.S.C.S. § 1311(a), and publicly operated wastewater treatment plants must comply with the act's clean water standards, regardless of cost. 33 U.S.C.S. §§ 1311(a), (b)(1)(B), (C), 1342(a)(1), (3).

Constitutional Law > Supremacy Clause > General Overview
Environmental Law > Water Quality > General Overview
HN12 Because Cal. Water Code § 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Cal. Water Code § 13377 that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot

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authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview

HN13 The federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., reserves to the states significant aspects of water quality policy, 33 U.S.C.S. § 1251(b), and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard, 33 U.S.C.S. § 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are more stringent than required by federal law-from taking into account the economic effects of doing so.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that California law required a regional water quality control board to weigh the economic burden on a wastewater treatment facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. (Superior Court of Los Angeles County, Nos. BS060960 and BS060957, Dzintra I. Janavs, Judge.) The Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 and B152562, concluded that Wat. Code, §§ 13241 and 13263, required a regional board to take into account "economic considerations" when it adopted water quality standards in a basin plan but not when the regional board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

The Supreme Court affirmed the judgment of the Court of Appeal, reinstating the wastewater discharge permits in part and remanding for further proceedings. The court held that whether the regional board should have complied with Wat. Code, §§ 13263 and 13241, of California's Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by **[*614]** federal law, from taking into account the economic effects of doing so. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J. (see p. 629).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
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CA(1)**(1) Pollution and Conservation Laws § 5—Water—"Basin Plans."**—Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Wat. Code, § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region, Wat. Code, § 13240. Under Wat. Code, § 13050, subd. (j), the regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Basin plans must be consistent with state policy for water quality control under Wat. Code, § 13240.

CA(2)**(2) Pollution and Conservation Laws § 5—Water—Federal and State Standards.**—Under 33 U.S.C. § 1370, of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act.

CA(3)**(3) Pollution and Conservation Laws § 5—Water—Federal and State Standards.**—The Clean Water Act, 33 U.S.C. § 1251 et seq., provides for two sets of water quality measures. Pursuant to 33 U.S.C. §§ 1311 and 1314, effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway under 33 U.S.C. § 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

CA(4)**(4) Pollution and Conservation Laws § 5—Water—Federal and State Standards.**—The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality **[*615]** standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, 33 U.S.C. § 1313(c), authorizes the EPA to promulgate water quality standards for the state.

CA(5)**(5) Pollution and Conservation Laws § 5—Water—National Pollutant Discharge Elimination System.**—Part of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. Title 33 U.S.C. § 1342(a), (b), of the NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. Under California law, Wat. Code, § 13374, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

CA(6)**(6) Statutes § 21—Construction—Legislative Intent.**—When construing any statute, the reviewing court's task is to determine the Legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

CA(7)**(7) Pollution and Conservation Laws § 5—Water—Wastewater Discharge Permits—Economic Considerations.**—Wat. Code, § 13263, directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in Wat. Code, § 13241. Listed among the § 13241 factors is economic considerations, in § 13241, subd. (d).

CA(8)**(8) Pollution and Conservation Laws § 5—Water—Wastewater Discharge**

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Permits—Economic Considerations.—Wat. Code, § 13377, specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of **[*616]** the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants must comply with the act's clean water standards under 33 U.S.C. §§ 1311(a), (b)(1)(B) and (C), 1342(a)(1) and (3), regardless of cost.

CA(9) **(9) Pollution and Conservation Laws § 5—Water—Wastewater Discharge Permits—Economic Considerations.**—Because Wat. Code, § 13263, cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Wat. Code, § 13377, that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's supremacy clause, U.S. Const., art. VI, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

CA(10) **(10) Pollution and Conservation Laws § 5—Water—Federal and State Standards.**—The federal Clean Water Act, 33 U.S.C. § 1251 et seq., reserves to the states significant aspects of water quality policy under 33 U.S.C. § 1251(b), and it specifically grants the states authority to enforce any effluent limitation that is not less stringent than the federal standard under 33 U.S.C. § 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state—when imposing effluent limitations that are more stringent than required by federal law—from taking into account the economic effects of doing so. Thus, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are less stringent than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit more stringent than federal law requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 68, 69.] **[*617]**

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JUDGES: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

OPINION BY: KENNARD **[**864]**

OPINION

KENNARD, J.—Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the

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United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic **[**865]** factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

[*619] I. Statutory Background

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704 [128 L. Ed. 2d 716, 114 S. Ct. 1900].) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats. 1969, ch. 482, § 18, p. 1051.) [1] Its goal is "to attain the highest water **[***307]** quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board). [2]

FOOTNOTES

1 Further undesignated statutory references are to the Water Code.

2 The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (§ 13200, subd. (d).)

CA(1)**(1)** HN1Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).) Basin plans must be consistent with "state policy for water quality control." (§ 13240.)

B. Federal Law

In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean **[*620]** Water Act. The Clean Water Act is a "comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, *supra*, 511 U.S. at p. 704, quoting 33 U.S.C. § 1251(a).) The act's national goal was to

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eliminate by the year 1985 "the discharge of pollutants into the navigable waters" of the United States. (33 U.S.C. § 1251(a)(1).) To accomplish this goal, the act established "effluent limitations," which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. §§ 1311, 1362(11).)

CA(2) **(2)** HN2 Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act. (33 U.S.C. § 1370.) This led the California Legislature in 1972 to amend the state's Porter-Cologne Act "to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act." (§ 13372.)

[866]** CA(3) **(3)** Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046], described the distinct roles of the state and federal agencies in enforcing water quality: "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). Toward **[***308]** this end, HN3 [the Clean Water Act] provides for two sets of water quality measures. 'Effluent limitations' are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[3] See §§ 1311, 1314. '[W]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976).

FOOTNOTES

3 A "HN4 point source" is "any discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. § 1362 (14).)

[*621] CA(4) **(4)** "HN5 The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. § 1313(c)." (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.)

CA(5) **(5)** HN6 Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. Factual Background

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This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles-Glendale Water Reclamation Plant (Los Angeles-Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles-Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Bur **[***309]** bank, serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

[*622] All three plants, which together process hundreds of millions of gallons of sewage **[**867]** each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary. [4] The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent. [5]

FOOTNOTES

[4] This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

[5] For example, the permits for the Tillman and Los Angeles-Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

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Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional **[*623]** board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed $ 50 million annually, representing more than 40 percent of its entire budget for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over $ 9 million annually, a nearly 100 percent increase above its $ 9.7 million annual budget for wastewater treatment.

[*310]** The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings **[**868]** to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases. [6]

FOOTNOTES

[6] Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

[*624] III. Discussion

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter-Cologne Act. (See *ante*, at p. 619.) Section 13263 provides in relevant part: "HN7 *The regional board*, after any necessary hearing, *shall prescribe requirements as to the nature of any proposed discharge* [of wastewater]. *The requirements* shall implement any relevant water quality control plans that have been adopted, and *shall take into consideration* the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need

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water quality objectives reasonably required for that purpose, other waste discharges to prevent nuisance, and *the provisions of Section 13241*." (§ 13263, subd. (a), italics added.)

Section 13241 states: "HN8 Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

[*311]** "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations*.

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Italics added.)

The Cities here argue that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider section 13241's listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions in discharged effluent or treated wastewater.

[*625] Thus, at issue is language in section 13263 stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of Section 13241." According to the Cities, this statutory language requires that a regional board make an independent evaluation of the section 13241 factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge **[**869]** permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

CA(6) **(6)** HN9 When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal. Rptr. 3d 623, 74 P.3d 726]; see *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan*, *supra*, at p. 715.)

CA(7) **(7)** As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were sections 13263 and 13241. HN10 Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is "[e]conomic considerations." (§ 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's

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intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 **[***312]** Cal. Rptr. 3d 343, 88 P.3d 71].) Like sections 13263 and 13241, section 13377 is part of the Porter-Cologne Act. But unlike the former two statutes, section 13377 was **[*626]** not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

CA(8) **(8)** *HN11* Section 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.,* §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)). *HN12* *CA(9)* **(9)** Because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. [7] Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's **[**870]** declaration in section 13377 that all discharged wastewater must satisfy federal standards. [8] This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is " 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; see *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923 [12 Cal. Rptr. 3d 262, 88 P.3d 1].) To comport with the principles of federal supremacy, California law cannot authorize this **[*627]** state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

FOOTNOTES

[7] The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways*." (Conc. opn. of Brown, J., *post*, at p. 629, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (§§ 13241 & 13263.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards, regardless of cost* (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3))." (Italics added.)

[8] As amended in 1978, section 13377 provides for the issuance of waste discharge permits that comply with federal clean water law "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." We do not here decide how this provision would affect the cost-consideration requirements of sections 13241 and 13263 when more stringent effluent standards or limitations in a permit are justified for some reason independent of

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compliance with federal law.

[*313]** Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account "economic considerations," such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal "*wherever attainable,*" an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters' "*use and value* for navigation" when revising or adopting a "water quality standard." (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

CA(10)↑**(10)** At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. *HN13*↑The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit **[*628]** a state—when imposing effluent limitations that are *more stringent* than required by federal law—from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a "navigable water" of the **[**871]** United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172 [148 L. Ed. 2d 576, 121 S. Ct. 675] ["The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."].) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See Cal. Rules of Court, rule **[***314]** 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

Conclusion

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as

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they do not compromise the federal clean water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

Disposition

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. The Court of Appeal is directed to remand this **[*629]** matter to the trial court to decide whether any numeric limitations, as described in the permits, are "more stringent" than required under federal law and thus should have been subject to "economic considerations" by the Los Angeles Regional Board before inclusion in the permits.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

CONCUR BY: BROWN

CONCUR

BROWN, J., Concurring.—I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because "the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Maj. opn., *ante*, at p. 618.) That seems a pretty self-evident proposition, but not a useful one. The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law—which purports to be an example of cooperative federalism—would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns. **[***315]**

[872] I. Federal Law**

"In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as

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California's. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA's NPDES permit system, the states are required to develop *water quality standards*. [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.? [Citation.] A water quality standard for any **[*630]** given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water quality criteria can be either *narrative* or *numeric*. [Citation.]" (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092–1093 [1 Cal. Rptr. 3d 76].)

With respect to satisfying water quality standards, "a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as 'any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.' [Citation.] 'Effluent limitations are a means of *achieving* water quality standards.' [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA's NPDES permit system provides for a two-step process for the establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.] [¶] The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are 'necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations ... .' [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL's implement water quality standards." (*Communities for a Better Environment v. State Water Resources Control Bd.*, *supra*, 109 Cal.App.4th at pp. 1093–1094, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, "[u]nder the CWA, states have the primary role in promulgating water quality standards." (*Piney Run Preservation Ass'n v. Commrs. of Carroll Co.* (4th Cir. 2001) 268 F.3d 255, 265, fn. 9.) "Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. § 1311] are primarily the states' handiwork." **[***316]** (*American Paper Institute, Inc. v. U.S. Envtl. Protection Agency* (D.C. Cir. 1993) 302 U.S. App. D.C. 80 [996 F.2d 346, 349] (*American Paper*).) In fact, upon the 1972 passage of the CWA, "[s]tate water quality standards in effect at the time ... were deemed to be the initial water quality benchmarks for CWA purposes ... . The states were to revisit and, if **[*631]** necessary, revise those initial standards at least once every three years." (*American Paper*, at p. 349.) Therefore, "once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." (*American Paper*, at p. 350.) Accordingly, it appears that in most instances, **[**873]** state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.; Stats. 1969, ch. 482, § 18, p. 1051; hereafter Porter-Cologne Act), the regional water quality control boards establish water quality standards—and therefore federal requirements for NPDES permits—through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors—including economic factors—set forth in Water Code section 13241.

In addition, as one court observed: "The Porter-Cologne Act ... established nine regional boards

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to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as 'waste discharge requirements,' and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13377, 13374.) [¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards 'shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (Wat. Code, § 13377.) Water Code section 13374 provides that '[t]he term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the [Clean Water Act].' [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.)" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128].)

[*632] Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board)—the body responsible to enforce the statutory framework—failed to comply with its statutory mandate.

[*317]** For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, "[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years—a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they 'protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act. [Citation.] Additionally, the CWA directs **[**874]** states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.' " (*American Paper*, *supra*, 996 F.2d at p. 349.)

According to the Cities, "[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994." The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion—including economic considerations—at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

[*633] Our decision today arguably allows the Board to continue to shirk its statutory duties.

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The majority holds that when read together, Water Code sections 13241, 13263, and 13377 do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, at pp. 625–627.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits." (*Id.* at pp. 628–629.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See 33 U.S.C. § 1311 (b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description "no toxins in toxic amounts." As far as I can determine, NPDES permits **[***318]** designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration. [1] In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner. [2] In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

FOOTNOTES

1 (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

2 Indeed, given the fact that "water quality standards" in this case are composed of broadly worded components (i.e., a narrative criteria and "designated beneficial uses of the water body"), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

[*634] Accordingly, I cannot conclude that the majority's decision is wrong. The analysis **[**875]** may provide a reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," [3] I write separately to set forth my concerns and concur in the judgment—*dubitante.* [4]

FOOTNOTES

3 Marvin Gaye (1971) "Inner City Blues."

4 I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 [2005 WL 466202] (conc. opn. of Berzon, J.).)

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown,

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J., did not participate therein.

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*109 Cal. App. 4th 1089, *; 1 Cal. Rptr. 3d 76, **;*
*2003 Cal. App. LEXIS 877, ***; 2003 Cal. Daily Op. Service 5149*

COMMUNITIES FOR A BETTER ENVIRONMENT et al., Plaintiffs and Respondents, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants; TESORO REFINING AND MARKETING COMPANY, Real Party in Interest and Appellant.

No. A100327.

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

109 Cal. App. 4th 1089; 1 Cal. Rptr. 3d 76; 2003 Cal. App. LEXIS 877; 2003 Cal. Daily Op. Service 5149; 2003 Daily Journal DAR 6533

May 30, 2003, Decided
May 30, 2003, Filed

SUBSEQUENT HISTORY: [*1]** The publication status of this document has been changed by the court from unpublished to published. June 13, 2003.
Rehearing denied by Communities for a Better Environment v. Cal. State Water Resources Control Bd., 2003 Cal. App. LEXIS 1082 (Cal. App. 1st Dist., June 27, 2003)
Review pending at Tesoro Refining and Marketing Co. v. Communities for a Better Environment, 2003 Cal. LEXIS 6655 (Cal., Sept. 11, 2003)
Review denied by Tesoro Refining & Marketing Co. v. Communities for a Better Environment, 2003 Cal. LEXIS 7251 (Cal., Sept. 24, 2003)
Appeal after remand at Cmtys. v. State Water Res. Control Bd., 2005 Cal. App. LEXIS 1514, 34 Cal. Rptr. 3d 396 (Cal. App. 1st Dist., Aug. 29, 2005)

PRIOR HISTORY: San Francisco County Superior Court. San Francisco County Super. Ct. No. 319575. The Honorable James J. McBride.

DISPOSITION: The judgment granting the petition for writ of mandate on the first issue of the petition is reversed. The cause is remanded to the superior court for determination of the second and third issues of the petition.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee environmental group challenged, in the San Francisco County Superior Court (California), a discharge permit issued to appellant refinery. They sought a writ of mandate arguing that the amended permit failed to comply with applicable federal pollution control laws because it failed to set a numeric water quality based effluent limit (WQBEL) for dioxin discharges. The court granted the petition. The refinery appealed.

OVERVIEW: The refinery argued that the trial court erred by determining that a WQBEL in the amended permit had to be numeric. The group countered by essentially arguing that the amended permit contained no WQBEL at all, numeric or otherwise, because the permit did not "establish" a current effluent limitation but deferred to the future process. The court of appeal disagreed. 40 C.F.R. § 122.44(d) did not require a numeric WQBEL under the circumstances of the case. In the pertinent text of § 122.44(d), the word "numeric" never modified "effluent limitation," only "water quality criterion." The reference to "numeric water quality criterion" was in section 122.44(d)(1)(vi)(A)-the very provision the trial court found required a numeric WQBEL. However, the Environmental Protection Agency made it clear that the function of § 122.44(d)(1)(vi) was to allow a permitting authority to derive a numeric water quality criterion when the state had only a narrative criterion. It appeared that in the application of the modifier "numeric," the trial court confused effluent limitations with water quality criteria.

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There was nothing in the regulation which mandated numeric WQBELs in all circumstances.

OUTCOME: The judgment granting the petition for writ of mandate on the first issue of the petition was reversed. The case was remanded for determination of the second and third issues of the petition.

CORE TERMS: dioxin, refinery, effluent, regional, numeric, water quality, pollutant, interim, criterion, concentration, pollution, narrative, deference, pollution control, administrative agency's, point sources, discharged, expertise, zero, writ of mandate, polluter, performance-based, reduction, load, wastewater, furans, quality-based, beneficial, stringent, chemical

LEXISNEXIS(R) HEADNOTES

Environmental Law > Water Quality > General Overview

HN1 40 C.F.R. § 122.44(d) requires water quality based effluent limits (WQBEL) whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including narrative criteria for water quality. The analysis to determine what pollutants must have WQBELs is commonly called the "reasonable potential analysis."

Environmental Law > Water Quality > General Overview

HN2 See 40 C.F.R. § 122.44(d)(1)(iii).

Environmental Law > Water Quality > General Overview

HN3 See 40 C.F.R. § 122.44(d)(1)(vi).

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation
Civil Procedure > Appeals > Standards of Review > General Overview

HN4 An appellate court's standard of review must extend appropriate deference to the administrative agencies and their technical expertise. While interpretation of a statute or regulation is ultimately a question of law, the appellate court must also defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

HN5 The function of 40 C.F.R. § 122.44(d)(1)(vi) is to allow a permitting authority to derive a numeric water quality criterion when the state has only a narrative criterion. Section 122.44(d)(1)(vi) requires National Pollutant Discharge Elimination System permit writers to use one of three mechanisms to translate relevant narrative criteria into chemical-specific effluent limitations.

Environmental Law > Water Quality > General Overview

HN6 Under 40 C.F.R. § 122.44(d)(1), there is no legal requirement that effluent limitations be numeric.

SUMMARY:

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CALIFORNIA OFFICIAL REPORTS SUMMARY

Two organizations filed a petition for a writ of mandate challenging a refinery's pollutant discharge permit, as amended by the local water quality control board and upheld by the State Water Resources Control Board. The trial court granted the petition on the ground that the water quality based effluent limit (WQBEL) for dioxin discharges in the permit was not numeric, as required by federal regulations. (Superior Court of the City and County of San Francisco, No. 319575, James J. McBride, Judge.)

The Court of Appeal reversed and remanded. The court held that the relevant federal regulation did not require that a WQBEL be numeric in all cases. Under the circumstances, the court held, the agencies involved properly concluded that a numeric WQBEL was not feasible. The court further held that the agencies' establishment of a rigorous schedule of compliance, which would require the refinery either to comply with the dioxin requirements of a written, quantitative plan and analysis for maintaining water quality in all seasons, in the interests of achieving a comprehensive regional solution, or to reduce dioxin discharges to zero, amounted to a WQBEL, even though not numeric. (Opinion by Marchiano, P. J., with Swager and Margulies, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

CA(1a) CA(1b) CA(1c) **(1a)(1b)(1c)Pollution and Conservation Laws § 5--Pollution--Water Pollution--Refinery's Discharge of Dioxins--Nature of Effluent Limits Imposed.** --In a proceeding for a writ of mandate by two organizations challenging a refinery's pollutant discharge permit, as amended by the local water quality control board and upheld by the State Water Resources Control Board, the trial court erred in granting the relief prayed for on the ground that the water quality based effluent limit (WQBEL) for dioxin discharges in the permit had to be numeric. The relevant federal regulation does not require that a WQBEL be numeric in all cases. Under, the circumstances, the agencies involved properly concluded that a numeric WQBEL was not feasible. Further, the agencies' establishment of a rigorous schedule of compliance, which would require the refinery either to comply with the dioxin requirements of a written, quantitative plan and analysis for maintaining water quality in all seasons, in the interests of achieving a comprehensive regional solution, or to reduce dioxin discharges to zero, amounted to a WQBEL, even though not numeric.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 69.]

CA(2) **(2)Administrative Law § 138--Judicial Review and Relief--Decision of Courts on Review and Subsequent Proceedings--Deference to Agency's Decision.** --In reviewing a trial court's grant of mandamus relief from an agency decision, the appellate court extends appropriate deference to the agency and its technical expertise.

CA(3) **(3)Administrative Law § 121--Judicial Review and Relief--Scope and Extent of Review--Questions of Law--Interpretation of Statutes and Regulations.** --While the interpretation of a statute or regulation is ultimately a question of law, a court must defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted

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provision.

CA(4)**(4)Administrative Law § 35--Administrative Actions--Legislation or Rule Making--Construction and Interpretation of Rules and Regulations--Deference to Agency.** --A court must extend considerable deference to an administrative agency's interpretation of its own regulations or the regulatory scheme that the agency implements or enforces. The agency interpretation is entitled to great weight unless unauthorized or clearly erroneous. The factors governing the degree of judicial deference to agency interpretations include the court's assumption that the agency has the technical knowledge and expertise to interpret complex regulations in a technical or complex scheme. They also include the likelihood that agency officials have reached the interpretation after careful and studied review and input from the public.

COUNSEL: Bingham McCutchen, William H. Freedman, John R. Reese, Rick R. Rothman and David K. Bowles for Real Party in Interest **[***2]** and Appellant.

Mayer, Brown, Rowe & Maw, Gregory R. McClintock and Scott C. McAdam for Western States Petroleum as Amicus Curiae on behalf of Real Party in Interest and Appellant.

Downey, Brand, Seymour & Rohwer, Melissa A. Thorme, Nicole E. Granquist and Courtney J. Hamamoto for Bay Area Clean Water Agencies as Amicus Curiae on behalf of Real Party in Interest and Appellant.

Earthjustice, Chris Jensen, Michael R. Lozeau and Deborah A. Sivas for Plaintiffs and Respondents.

JUDGES: (Opinion by Marchiano, P. J., with Swager and Margulies, JJ., concurring.)

OPINION BY: Marchiano

OPINION

[77] [*1091] MARCHIANO, P. J.**—

Appellant Tesoro Refining and Marketing Company operates the Golden Eagle Refinery (the Refinery) near Avon, California, on the shores of Suisun Bay. The Refinery operates under a National Pollutant Discharge Elimination System (NPDES) permit issued by the Regional Water Quality Control Board, San Francisco Bay Region (Regional Board). The permit regulates the Refinery's discharges of dioxins and other pollutants into Suisun Bay. In June 2000 the Regional Board amended the permit. After an administrative **[***3]** appeal, the State Water Resources Control Board (State Board) upheld the amended permit.

Respondents, Communities for a Better Environment and San Francisco BayKeeper, challenged the amended permit by a petition for writ of mandate in the superior court. Respondents argued, inter alia, that the amended permit failed to comply with applicable federal pollution control laws because it failed to set a numeric "water quality based effluent limit" (WQBEL) for dioxin discharges. The superior court agreed and granted the petition. Tesoro appeals from the judgment granting the writ of mandate, and argues that the trial court erred by ruling a WQBEL had to be numeric. We reverse because a WQBEL does not have to be numeric in all cases, and under the circumstances of this case three administrative agencies properly approved the amended permit as a valid means of pollution control.

[*1092] [78]** I. BACKGROUND

Before we review the merits, we must first discuss the legal, factual, and procedural background of this case.

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A. *Legal Background*

We begin with a brief overview of the applicable law. To enhance understanding we use italics to introduce significant terms of art of **[***4]** pollution control.

In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA). (See *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452 [126 Cal. Rptr. 2d 389] (*WaterKeepers*).) The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a); see *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046, 1054] (*Arkansas*).)

Generally, the CWA "prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]" (*WaterKeepers, supra,* 102 Cal.App.4th at p. 1452.) The most important of those exceptions is pollution discharge under a valid NPDES permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. (33 U.S.C. § 1342; **[***5]** *WaterKeepers, supra,* at p. 1452; see *Arkansas, supra,* 503 U.S. at pp. 101–103 [112 S.Ct. at pp. 1054–1055].) NPDES permits are valid for five years. (33 U.S.C. § 1342(b)(1)(B).)

Under the CWA's NPDES permit system, the states are required to develop *water quality standards*. (33 U.S.C. § 1313(a); see *Arkansas, supra,* 503 U.S. at p. 101 [112 S.Ct. at p. 1054].) A water quality standard "establish[es] the desired condition of a waterway." (503 U.S. at p. 101 [112 S.Ct. at p. 1054].) A water quality standard for any given waterway, or "water body," has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i) (2002).)

Water quality criteria can be either *narrative* or *numeric*. (40 C.F.R. § 131.3(b) (2002).) By way of example, in its decision below the State Board noted that "[a] typical narrative criterion ... prohibits 'the discharge of toxic pollutants in toxic amounts.' " A numeric **[***6]** criterion establishes a quantitative limitation on pollutant concentrations or levels, to protect beneficial **[*1093]** uses of the water body. (40 C.F.R. § 131.3(b) (2002).) The State Board noted, "An example of a numeric saltwater criterion for copper to protect aquatic life is 3.1 micrograms per liter (ug/l) as a monthly average."

Generally, to meet water quality standards a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as "any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." (33 U.S.C. § 1362(11).) [1] "Effluent limitations **[**79]** are a means of *achieving* water quality standards." (*Trustees For Alaska v. E.P.A.* (9th Cir. 1984) 749 F.2d 549, 557, italics in original.)

FOOTNOTES

1 A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C. § 1362(14).)

[*7]** NPDES permits establish effluent limitations for the polluter. (33 U.S.C. §§ 1311, 1312, 1342(a)(1); *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 205 [48 L. Ed. 2d 578, 96 S.Ct. 2022] (*EPA*).) CWA's NPDES permit system provides for a two-step process for the

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establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. (33 U.S.C. § 1311(b)(1)(A); see *EPA, supra,* at pp. 204–205 [96 S.Ct. at pp. 2024–2025].)

Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress "supplemented the 'technology-based' effluent limitations with 'water quality-based' limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' " (**[***8]** *National Wildlife Fed. v. U.S. Army Corps* (D.Or. 2000) 92 F. Supp. 2d 1072, 1075, quoting *EPA, supra,* 503 U.S. at p. 205, fn. 12 [96 S. Ct. at p. 2025].)

The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are "necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations ... ." (33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2002).) Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the **[*1094]** CWA. (33 U.S.C. § 1370; see Wat. Code, §§ 13263, subd. (a), 13372.) Simply put, WQBEL's implement water quality standards. [2]

FOOTNOTES

2 In California, water quality standards are established through regional water quality control plans, known as basin plans, which are approved by the State Board. (See *WaterKeepers, supra,* 102 Cal.App.4th at pp. 1451–1452.)

[*9]** EPA regulations implement the two-prong effluent limitation system for NPDES permits. The regulation pertinent to the issue on appeal is 40 Code of Federal Regulations section 122.44 (2003)(section 122.44). [3] Section 122.44(a)(1) requires technology-based effluent limitations. Section 122.44(d) governs WQBEL's.

FOOTNOTES

3 Henceforth, we will refer to this part as "section 122.44," and to any of its subdivisions or smaller components as, for example, "section 122.44(d)(1)(i)."

Section 122.44(d)(1)(i) HN1 requires WQBEL's whenever the permitting agency determines that pollutants "are or may be discharged at a level which will cause, or *have the reasonable potential to cause, or contribute to* an excursion above any State water quality standard, [including narrative criteria for water quality]." (Italics added.) According to the State Board's decision, "The analysis to determine what pollutants must have [WQBEL's] is commonly called the 'reasonable potential analysis.' "

Section 122.44(d)(1)(iii) **[***10]** provides that HN2 "When the permitting authority determines ... that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant."

Section 122.44(d)(1)(vi) provides that HN3 "Where a State has not established a water quality criterion for a specific chemical **[**80]** pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a

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narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

"(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting **[***11]** its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October **[*1095]** 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

"(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

"(C) [The parties agree that option C, the third and final option, is not pertinent to this case. We therefore omit it.]"

We note that the trial court granted the writ of mandate on the ground that the Refinery permit, as amended by the State Board, "does not contain a numeric WQBEL ... in violation of [section] 122.44(d)(1)(vi)(A)." Whether section 122.44(d)(1)(vi)(A) requires a numeric WQBEL is the central issue to this appeal. As noted above, a water quality *standard* can be numeric; the question before us is whether a *WQBEL*, which implements a narrative or numeric water quality standard, *must itself* be numeric. Before we reach that issue we must conclude **[***12]** our discussion of this case's legal, factual, and procedural background.

Water quality standards do more than provide the basis for deriving effluent limits. The standards also are instrumental in identifying bodies of water which are impaired by the cumulative discharges of pollutants. The CWA requires the states to identify all bodies of water for which technologically-based effluent limitations are insufficient to maintain water quality standards. (33 U.S.C. § 1313(d)(1)(A); see 40 C.F.R. § 130.7 (2002).)

For all such identified water bodies, and for all appropriate pollutants discharged therein, the state must establish a *total maximum daily load* (TMDL), which defines the maximum amount of the pollutant which can be discharged—or "loaded"—into the body of water from all combined pollution sources. (40 C.F.R. § 130.2(i) (2002); see *Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520.) A TMDL is "a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant." (40 C.F.R. § 130.2(h) (2002).)

A TMDL must be "established **[***13]** at a level necessary to implement the applicable water quality standards ... ." (33 U.S.C. § 1313(d)(1)(C).) A TMDL assigns a *waste load allocation* (WLA) to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. (40 C.F.R. § 130.2(g) **[*1096]** (2002).)Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLA's in the TMDL. (§ 122.44(d)(1)(vii)(B).) In fact, a WLA in a completed TMDL is a type of WQBEL. (40 C.F.R. § 130.2(h) (2002).)

[81]** B. *Factual Background*

The factual background of this case, both scientific and historical, is not in material dispute.

1. *Scientific Background—Dioxins and Furans*[4]

FOOTNOTES

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4 We take the facts in this part primarily from the written decision of the State Board. We by no means intend to present a comprehensive scientific discussion of the nature of dioxins and furans and their effect on the environment. Such a discussion is neither within the expertise of this court nor necessary for our resolution of this case.

[*14]** Dioxins (polychlorinated dibenzodioxins) and furans (polychlorinated dibenzofurans) are two classes of over 200 structurally similar compounds. Seventeen of these compounds are considered the most toxic, at least for the purposes of the water quality case now before us. The most toxic of the 17 is the dioxin known as "2,3,7,8-tetrachlorodibenzo-p-dioxin," also known as "2,3,7,8-TCDD." The other 16 compounds are 6 dioxins and 10 furans, collectively considered "congeners" of 2,3,7,8-TCDD, meaning simply that they possess similar qualities or characteristics. [5] For the sake of simplicity, further references to "dioxins" in this opinion are to these 17 toxic dioxins and furans.

FOOTNOTES

5 A "congener" is defined generally as "[a] member of the same kind or class with another, or nearly allied to another in character." (Oxford English Dict. (2d ed. 1989) [as of May 30, 2003].)

Dioxins are not produced intentionally. They are formed as undesired byproducts of combustion and the manufacture and use of certain chlorinated **[***15]** chemical compounds. They exist in the environment worldwide, particularly in air, water, soils, and sediments. They enter the atmosphere through aerial emissions and widely disperse through a number of processes, including erosion, runoff, and volatilization from land or water. For example, automobile exhaust is a common source of dioxins.

Dioxins are insoluble in water and very persistent in soil and sediments. They are absorbed into organic matter and bioaccumulate in human and animal tissue. They enter the food chain and thus bioaccumulate in human tissue from consumption of contaminated food, especially meat, fish, shellfish, and eggs.

[*1097] The EPA has targeted dioxins as dangerous and toxic substances since at least 1984. The State Board and the Regional Board have regulated dioxin discharges since at least the early 1990's.

2. *Historical Background*

As noted in the lead paragraph, Tesoro operates the Refinery on the shores of Suisun Bay. [6] The Refinery processes an average of 150,000 barrels of crude oil a day, producing gasoline and diesel fuel. Treated wastewater from the Refinery production—an average of 4.7 million gallons per day — **[***16]** is discharged into Suisun Bay through an outfall pipe known as "Waste 001." Waste 001 lies at the end of a two-mile canal, known as the "Clean Canal," through which storm water from several other industrial facilities drains into the bay. Thus, only a portion of the bay discharge from Waste 001 comes from the Refinery—although that fact was not known at the outset, but only emerged over time.

FOOTNOTES

6 Various changes in the ownership and name of the Refinery do not concern us here.

Five of the 17 dioxins discussed above are consistently found in the Refinery's wastewater. The

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five do not include 2,3,7,8-TCDD.

The Refinery's discharges are governed by NPDES permit No. CA0004961, first **[**82]** issued by the Regional Board in 1988. In 1993, the Regional Board reissued the permit, and imposed—apparently for the first time—a numeric WQBEL for dioxins. The 1993 permit included a WQBEL of 0.14 picograms per liter (pg/L) of "TCDD equivalents." [7] The phrase "TCDD equivalents" refers to the 17 toxic dioxins discussed **[***17]** above. The WQBEL of 0.14 pg/L was based on the State Board's 1992 amendments to the San Francisco Bay Basin Plan.

FOOTNOTES

[7] A picogram is one million-millionth of a gram, or 1 x 10-12 gram. (See Oxford English Dict., *supra*, definition of prefix "pico-," [as of May 30, 2003].)

The 1993 permit included a compliance schedule consisting of six tasks the Refinery was charged to complete. These included continuing a pilot study of a method of pollution control, and submitting technical and progress reports. The Refinery was to comply fully with the effluent limit by June 30, 1995. It appears that when the 1993 permit was issued, the Regional Board assumed the Refinery was the sole, or at least the primary, source of dioxin discharge into Suisun Bay.

By October 1993, the Refinery had begun treating its wastewater with granulated activated carbon. This treatment was "successful at removing greater than 95 of the dioxins" from the Refinery's discharges.

[*1098] On June 21, 1995, the Regional Board reaffirmed **[***18]** the Refinery's 1993 NPDES permit, by rejecting the Refinery's request for an amendment to the numeric WQBEL for dioxins. The Regional Board found that "the effluent limit specified" in the 1993 permit "is appropriate and necessary for the full protection of water quality for beneficial uses."

On November 15, 1995, the Regional Board issued a cease-and-desist order (CDO) against the Refinery. In the CDO the Regional Board observed that—despite the removal of 95 percent of the dioxins from the wastewater by carbon treatment—the monitoring data since November 1993 "show no appreciable reduction of dioxins levels in the discharge from [the Refinery]. The data show that although treatment of the regeneration wash water was effective at the source, it had little if any impact on the final discharge."

The Regional Board then observed: "[The Refinery] has performed some preliminary studies to determine other potential sources of dioxins to Waste 001. Although not conclusive at this time because of the limited amount of data available, these preliminary studies indicate that [the Refinery's] treatment plant effluent may not be the major source of dioxins in the Waste 001 discharge. **[***19]** Other streams which combine with the treatment plant effluent in the 'Clean Canal' may be contributing greater quantities of dioxins. These streams include [the Refinery's] coke storage pond water, storm water runoff from non-process areas, storm water runoff from adjoining properties, and possibly even sediment in the 'Clean Canal.' Further investigation is necessary to verify any of these preliminary findings."

The Regional Board found that the Refinery "has put forth a reasonable amount of effort ... to solve the dioxin problem by installing the treatment system for catalytic reformer wash water." But the fact of continued pollution remained, regardless of the uncertainty about its source. The Regional Board found that all seven compliance samples of the Waste 001 discharge into Suisun Bay contained dioxins above the effluent limit of the 1993 permit, i.e., 0.14 pg/L. "These data show that [the Refinery] has violated and is threatening **[**83]** to continue to violate the effluent limit for dioxin specified in" the 1993 and 1995 permits. Thus, "additional effort is necessary to reduce the discharge of dioxins so that beneficial uses of the receiving water are fully protected. **[***20]** "

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Accordingly, in the CDO the Regional Board ordered the Refinery to immediately comply with an interim effluent limit of 0.14 pg/L for 2,3,7,8-TCDD, the most toxic dioxin, and to conduct a comprehensive study of measures to enable the Refinery to comply with a final effluent limit of 0.14 **[*1099]** pg/L for all 17 dioxins. Such "final compliance" with the effluent limit for all dioxins was required by July 1, 1999.

On June 16, 1999, the Regional Board issued an order extending the deadline for final compliance to July 1, 2000. In its six-page order, the Regional Board found the Refinery "has been in compliance with the interim" effluent limit for 2,3,7,8-TCDD. The Regional Board further found that the Refinery was still out of compliance with the effluent limits for the other 16 dioxins, as set forth in the 1993 and 1995 permits, but through its pollution control efforts the Refinery had substantially reduced discharge concentrations of those dioxins.

The Regional Board also noted that a Refinery investigation had shown that the refinery was not the primary source of dioxins in Suisun Bay. Rather, the dioxins entered the water by "atmospheric deposition," from sources such **[***21]** as motor vehicle exhaust and wood burning. The Refinery's wastewater thus became a "conveyance[] of dioxins ... from other sources."

The Regional Board granted the extension of the final compliance deadline because changes in the statewide water quality standards and policies regarding dioxins were forthcoming, and the Regional Board believed that any action to revise the terms of the CDO should await the new standards.

In May of 1999 the EPA formally declared Suisun Bay an impaired water body for several pollutants, including dioxins. In November 1999 the EPA wrote the Regional Board regarding the Refinery's permit, and stated the WQBEL for dioxins should be zero "unless a TMDL is completed which concludes that an alternative load can be assimilated by the receiving water." The EPA proposed that the Refinery's permit contain "[a] final limit ... that compliance with the final WQBEL will be required within ____ years (not to exceed the time allowed in the Basin Plan). This limit will either be the WLA determined from an approved TMDL, or zero." The EPA also suggested that the Refinery be subject to numerous provisions, including a ban on increasing the mass of dioxins in the **[***22]** Bay and the implementation of an aggressive source control program.

The EPA reviewed the Regional Board's proposed changes to the permit. By a letter dated February 1, 2000, the EPA commented favorably on the proposed changes. The EPA specifically agreed with the Regional Board's proposal to complete a TMDL to derive a final WQBEL for dioxins. The EPA also agreed that the proposed permit incorporated EPA's suggested scheme of final limits of either a WLA from a completed TMDL, or **[*1100]** zero—and that these proposed final limits "meet the [WQBEL] requirements of ... [section] 122.44(d)."

On February 16, 2000, the Regional Board implemented the proposed changes by reissuing the Refinery's NPDES permit. The 2000 permit concluded that the Refinery's dioxin discharges have a reasonable potential of exceeding water quality standards. The 2000 permit retained the 0.14 pg/L WQBEL for all 17 dioxins. The Regional Board noted in the permit that the Refinery continued to reduce substantially **[**84]** dioxin concentration, and that the Refinery was not the primary source of the dioxins.

The WQBEL of 0.14 pg/L was retained as an interim limitation, imposed pending the completion **[***23]** of a TMDL. In light of the 1999 EPA finding that Suisun Bay was impaired for dioxins, the Regional Board included in the 2000 permit a statement of its intent to adopt a TMDL for dioxins by 2010. The TMDL for dioxins would include a WLA for the Refinery. "The final effluent limitations for [the Refinery's dioxin] discharge will be based on [the] WLA[] ... derived from the TMDL[]." The Regional Board determined to maintain the effluent limitations from the 1995 permit until such time as the TMDL was completed—at that point the Regional Board "[would] adopt a WQBEL consistent with the corresponding WLA."

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The adoption of the TMDL involved the EPA and was expected to take up to 13 years from the May 1999 EPA finding.

On June 21, 2000, the Regional Board amended the 2000 permit. In what we shall refer to as "the 2000 amendment," the Regional Board rescinded the numeric WQBEL of 0.14 pg/L because it was "not appropriate" for the Refinery. The Board gave two reasons for this action. First, the May 1999 EPA finding required a "region wide cross media assessment of the [dioxin] problem ... [which] should result in a more balanced, and more effective limitation" for the Refinery.

[*24]** Second, "[the Refinery] has reduced the dioxins ... in its discharge by 85 percent since CDO adoption. Despite this [the Refinery] cannot comply with [the numeric WQBEL]. The root cause of the violations are not within [the Refinery's] control, and the next step of treatment will be overly burdensome and not cost effective relative to the benefits. [The Refinery] provided data in 1997 that supports [its] contention that the violations are caused by ambient air deposition of dioxins ... . Much of this is beyond [the Refinery's] control ... . [The Refinery] has estimated that $ 10 [m]illion may be necessary to implement the next step of reduction. [The Refinery's] mass contribution is minor compared to other storm water inputs into the Bay."

[*1101] The Regional Board replaced the numeric WQBEL with an interim effluent limitation of 0.65 pg/L. This was not a WQBEL—the new interim effluent limitation was not water quality-based, but performance-based. That is, the new interim effluent limitation was based on facility performance, viz., the actual concentrations of dioxins in the Refinery's discharge. The limitation applied to five of the 17 dioxins actually **[***25]** found in the discharge. But the 2000 amendment requires the Refinery to monitor for all 17 dioxins. The limitation was calculated from effluent samples collected from August 1996 to January 2000. The limitation was based on the mean plus three standard deviations. It represents the 99.87 percentile of the August 1996 to January 2000 data.

The Regional Board intended the 0.65 pg/L interim effluent limitation to apply until the EPA prepared a TMDL for dioxins in Suisun Bay, at which point the final WQBEL for dioxins would be established as a WLA in the TMDL. The Regional Board estimated that the EPA would complete the TMDL by 2012. If one were not complete at that time, the WQBEL for dioxins would be "no net loading," or zero. These two alternative WQBEL's, the WLA or zero, are entirely consistent with the EPA's position in its letters of November 1999 and February 2000.

The 2000 amendment also included provisions for compliance monitoring. In fact, the amended 2000 permit contained a 12-year schedule of compliance imposing detailed **[**85]** responsibilities on the Refinery. These requirements include preparation of a pollution prevention plan addressing dioxins, accelerated monitoring **[***26]** in the event that additional dioxins are discovered in the effluent, and participation in the San Francisco Bay Regional Monitoring Program which gathers data in support of the development of the TMDL. [8]

FOOTNOTES

8 For instance, the 2000 amendment provides: "In the interim, until final WQBELs are adopted, state and federal antibacksliding and antidegradation policies require that the Board retains effluent concentration limits from the Previous Order [the 1995 permit] to ensure that the waterbody will not be further degraded. In addition to interim concentration limits, interim performance-based mass limits are required to limit the discharge of [EPA-identified] pollutants to their current levels. These interim mass limits are based on recent discharge data. ... Where pollutants have existing high detection limits [such as dioxins], interim mass limits are not required because meaningful performance-based limits cannot be calculated for those pollutants with non-detectable concentrations. However, [the Refinery is] required to investigate alternative analytical procedures that result in lower detection limits. ... [The Refinery] will also be required to conduct a study to investigate the feasibility and reliability of

increasing sample size to reduce the detection limits for [dioxins]."

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[*27]** C. *Procedural Background*

Respondents appealed to the State Board from the Regional Board's orders reissuing and amending the 2000 permit. After an evidentiary hearing **[*1102]** the State Board issued a lengthy decision largely upholding the orders of the Regional Board.

The State Board described the issuance of the 2000 permit as *interim permitting*, a process whereby five-year NPDES permits are issued in the interim pending the preparation of a TMDL—which frequently takes much longer than the lifetime of the permit.

The State Board noted that interim permitting "can be problematic because if a water body is impaired, the water may not be able to assimilate more of the impairing pollutant. If this is the case, effluent limitations for the pollutant may be based solely on the applicable criterion or objective with no allowance for dilution. Hence, they may be extremely stringent. Ultimately, when the TMDL is done, the stringent limitations may become unnecessary because nonpoint source controls may provide assimilative capacity for the point source discharges[.] This may be especially true in cases where [as here] nonpoint pollutant sources are the primary contributors **[***28]** and point sources [such as the Refinery] are insignificant."

After considering the evidence, including expert testimony, the State Board concluded the Regional Board acted properly by imposing the performance-based effluent limitation and the schedule of compliance. The State Board noted that dioxins posed a problem that had to be solved on a regional level by creation of a TMDL. In the interim, the Refinery could comply with an effluent level consistent with its actual performance. The State Board pointed out the Refinery was not a significant source of dioxins: "evidence in the record indicates that the dioxins ... in [Waste 001] are due primarily to stormwater runoff." And the Refinery had instituted measures resulting in an 85 percent reduction of dioxins discharged from the Clean Canal.

The State Board agreed with the Regional Board's determination that dioxins from the Refinery's discharge—even though the dioxins entered the discharge waters from other sources—created a reasonable potential for causing or contributing to the exceeding of water quality standards. **[**86]** Thus, under section 122.44(d), a WQBEL was required in the NPDES permit. The State Board concluded: **[***29]** "The Regional Board complied with the [CWA] because it did include water quality-based effluent limitations for all 17 dioxin[s] ... in the permit findings. These limits will be based on a TMDL or on no net loading." The State Board concluded the Regional Board properly imposed the performance-based interim effluent limitation under the circumstances of this case. The State Board also determined that the interim limit of 0.65 pg/L did not allow the Refinery to *increase* its discharges of dioxins.

[*1103] The State Board reduced the 12-year schedule of compliance to 10 years, to comply with the 1995 basin plan. In all other respects pertinent to this opinion, the State Board upheld the Regional Board.

Respondents challenged the State Board's determination with a petition for writ of mandate filed in superior court. Respondents raised three issues: (1) that the amended 2000 permit violated the CWA and section 122.44(d) by failing to establish a WQBEL for dioxins; (2) that the permit violated the antibacksliding provisions of the CWA; and (3) that the permit schedule of compliance was invalid because no WQBEL had been established.

The superior court granted mandamus **[***30]** relief on issue (1), ruling that the amended 2000 permit "does not contain a numeric WQBEL," and thus violates section 122.44(d)(1)(vi)(A).

Specifically, the court ruled as follows: (a) that the parties did not dispute the Refinery's permit must contain a WQBEL for dioxins; (b) that the interim effluent limitation of 0.65 pg/L was not a

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WQBEL because it was performance based, not water quality based; and (c) that "[t]he final limits established in [the amended 2000 permit] do not constitute WQBELs because they are not numeric limits as required by [section] 122.44(d)(1)(vi)(A). The primary final limit, the TMDL-based limit, is not a WQBEL within the meaning of section 122.44(d)[(1)](vi)(A) because no TMDL has yet been established by [the] EPA or the State, and it therefore does not constitute a numeric limit. The alternate final limit, the limit of 'no net loading,' is not a WQBEL within the meaning of section 122.44(d)[(1)](vi)(A) because the State has not yet developed a program that establishes a numeric limit."

The superior court did not reach issues (2) and (3) of the petition.

II. DISCUSSION

[*31]** CA(1a) **(1a)** Tesoro makes numerous arguments on appeal, but first argues the trial court erred by determining that a WQBEL in the amended 2000 permit had to be numeric. Respondents counter by essentially arguing that the amended permit contained no WQBEL at all, numeric or otherwise, because the permit did not "establish" a current effluent limitation but deferred to the future process of TMDL development. We conclude that a WQBEL does not always have to be numeric, and that under the circumstances of this case the Regional Board did include valid WQBEL's in the permit.

CA(2) **(2)** We first note HN4 our standard of review must extend appropriate deference to the administrative agencies in this case, and their technical expertise. **[*1104]** (See, e.g., *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 [166 Cal. Rptr. 331, 613 P.2d 579]; *WaterKeepers, supra,* 102 Cal.App.4th at pp. 1457–1458.) CA(3) **(3)** And while interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency's interpretation of a **[**87]** statute or regulation involving its area of expertise, unless the interpretation **[***32]** flies in the face of the clear language and purpose of the interpreted provision. (See *Family Planning Associates Medical Group, Inc. v. Belshe* (1998) 62 Cal.App.4th 999, 1004 [73 Cal. Rptr. 2d 221].)

CA(1b) **(1b)** We conclude that section 122.44(d) does not require a numeric WQBEL under the circumstances of this case. In the pertinent text of section 122.44(d), the word "numeric" never modifies "effluent limitation," only "water quality criterion." The reference to "numeric water quality criterion" is in section 122.44(d)(1)(vi)(A)-the very provision the trial court here found required a numeric WQBEL. But the EPA has made it clear that HN5 the function of section 122.44(d)(1)(vi) is to allow a permitting authority to derive a *numeric* water quality criterion when the state has only a *narrative* criterion. (National Pollutant Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed.Reg. 23868, 23875 (June 2, 1989).) Section 122.44(d)(1)(vi) "requires NPDES permit writers to use one of three mechanisms to translate relevant narrative criteria into *chemical-specific* effluent limitations." (**[***33]** *American Paper Institute, Inc. v. U.S. E.P.A.* (D.C. Cir. 1993) 996 F.2d 346, 350.)

It thus appears that in the application of the modifier "numeric," the trial court confused effluent limitations (i.e., WQBEL's) with water quality criteria. We see nothing in the regulation which mandates numeric WQBEL's in all circumstances. The definition of "effluent limitation" in the CWA refers to "any restriction," does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance. (33 U.S.C. § 1362(11).) Moreover, section 122.44(k)(3) permits non-numeric WQBEL's where numeric ones are not feasible.9 [9]

FOOTNOTES

9 The regulation provides that so-called "best management practices" may control or abate pollution discharges when "[n]umeric effluent limitations are infeasible ... ." This is not inconsistent with section 122.45(d)(1), which requires that effluent limitations for continuous discharges be stated as maximum daily and average monthly discharge limitations "unless

impracticable."

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[*34]** Case law is limited. A few cases seem to assume that a WQBEL is always a number, but the cases do not squarely address and decide the issue. (See *Am. Iron & Steel Inst. v. E.P.A.* (3rd Cir. 1976) 543 F.2d 521, 528; *American Iron And Steel Institute v. E.P.A.* (3rd Cir. 1975) 526 F.2d 1027, 1045.) But **[*1105]** *Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369 (*Costle*), suggests that Congress did not intend numeric effluent limitations to be the only limitation on pollution discharges under the CWA, but intended a flexible approach including alternative effluent control strategies. (*Costle, supra,* 568 F.2d at p. 1380 & fn. 21.)

We find instructive a prior decision of the State Board, of which we have taken judicial notice: *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society* (Order No. WQ 91-03, May 16, 1991) 1991 WL 135460 (Cal.St.Wat.Res.Bd.). In that order, the State Board stated: "The petitioners contend that the Clean Water Act, and regulations and court decisions **[***35]** interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits ... . We have reviewed these authorities, and also opinions we have received from EPA, and conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source **[**88]** control measures and 'best management practices' set forth in the permit constitutes effluent limitations as required by law." (1991 WL 135460, p. *12.)

The State Board noted the EPA's regulatory definition of "effluent limitation" was broad, and noted that the *Costle* decision supported the conclusion that numeric limitations were not required—especially since CWA " 'gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. ...' " (1991 WL 135460, p. *15, quoting *Costle, supra,* 568 F.2d at p. 1380.)

Specifically referring to section 122.44(d)(1), the State Board noted the regulation did not contain "the term 'numeric' effluent limitation. ... Concededly, in most cases, the easiest and most effective chemical-specific limitation would be numeric. However, **[***36]** HN6 there is no legal requirement that effluent limitations be numeric." (1991 WL 135460, p. *19, fn. omitted.)

In the present case, the Regional and State Boards in essence concluded that a numeric WQBEL was not feasible (i. e., "not appropriate") for the reasons discussed above. In accordance with applicable regulations, Tesoro's NPDES permit did not have to contain a numeric WQBEL, and the trial court erred by granting mandamus relief on that ground.

We turn to respondents' contention that the permit contains no WQBEL's at all, numeric or otherwise, because the Regional and State Boards deferred the determination of effluent limitations to the future completion of a TMDL, and did not establish current limitations. We note that this is not the **[*1106]** typical case of a point-source polluter significantly contributing to toxic concentrations in a water body. It is undisputed the Refinery is not the primary source of the dioxins in Suisun Bay, but the dioxins in fact come from other sources, including the forces of nature, beyond the Refinery's control. The goal of which we should not lose sight is a bay environment free of harmful dioxins from all sources, attainable **[***37]** through a comprehensive TMDL.

A TMDL must include allocations to both point and nonpoint sources of listed pollutants, such as dioxin. The limitation may be a daily load limit or may be part of multiple TMDL's on the water body or one TMDL addressing numerous pollutants. The sum of the allocations must result in the water body attaining the applicable water quality standards. [10]

FOOTNOTES

10 See the EPA Web site at and the State Board Web site at (as of May 30, 2003).

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The Regional and State Boards concluded the problem of dioxins had to be addressed comprehensively at a regional level, by the completion of a TMDL. To be an effective TMDL the source analysis must identify the amount, timing, and each point of origin of the dioxins contaminating the Bay. The allocation element of a TMDL assesses responsibilities, identifies specific actions to be taken by identified parties, and results in an allocation of the total allowable pollutant burden. The sum of individual allocations should equal the total allowable pollutant **[***38]** burden. [11]Achievement of harm-free levels of dioxins involves not only oversight of the Refinery, but also other sources of origin. The TMDL will impose an effluent limitation that will protect the Bay from all sources, which will necessarily include any dioxins controllable by Tesoro.

FOOTNOTES

11 See footnote 10, *ante*.

In the interim the Refinery, through a schedule of compliance, was allowed to discharge only at current levels, which are not a significant source of the Suisun Bay dioxin problem. At the conclusion of the TMDL preparation period, during which the refinery must comply with a rigorous schedule of compliance, the refinery will have to either (1) comply with the dioxin WLA in the completed TMDL or (2) reduce dioxin discharge to zero. These two limitations, effluent limitations based on water quality standards, qualify as WQBEL's in the 2000 amended permit. Title 33 United States Code section 1362(11) includes "schedules of compliance" within its definition of the term "effluent **[***39]** limitation." Section 1362(17) explains that a schedule of compliance "means a schedule of remedial measures including **[*1107]** an enforceable sequence of actions or operations leading to compliance with an effluent limitation, ..." Title 40 Code of Federal Regulations section 130.0 (1985) explains that the process of water quality planning and management is jointly implemented by the EPA, the states, interstate agencies, and areawide, local, and regional planning organizations. "This process is a dynamic one, in which requirements and emphases vary over time." (40 C.F.R. § 130.0(e) (2001).)

Three separate administrative agencies, the Regional Board, the State Board, and the EPA, have approved this approach after considering compliance requirements. The approach is based on the State Board's interpretation of section 122.44(d)(1). **CA(4)** **(4)** Generally, we extend considerable deference to an administrative agency's interpretation of its own regulations or the regulatory scheme which the agency implements or enforces. The agency interpretation is entitled to great weight unless unauthorized or clearly erroneous. (See, e.g., **[***40]** *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484 [71 Cal. Rptr. 2d 606]; *Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 613 [52 Cal. Rptr. 2d 846].) The factors governing the degree of judicial deference to agency interpretations are set forth in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 [78 Cal. Rptr. 2d 1, 960 P.2d 1031] (*Yamaha*). These factors include the court's assumption that the agency has the technical knowledge and expertise to interpret complex regulations in a technical or complex scheme. They also include the likelihood that agency officials have reached the interpretation after careful and studied review and input from the public. (See *Yamaha, supra,* at pp. 12–13.) Those factors are present in this case. **CA(1c)** **(1c)**

In light of the supporting record, and our reading of the applicable statutes and regulations, we agree with the agencies' determinations. [12] Respondents' arguments that the WQBEL's are contingent and precatory simply ignore the reality of a carefully conceived, agency-approved, long-term **[***41]** pollution control procedure for a complex environmental setting.

FOOTNOTES

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[12] This is not a case like *WaterKeepers*, in which we did not defer to the agency because the regulation in that case was ambiguous and lacked a clear interpretive history. (*WaterKeepers*, *supra,* 102 Cal.App.4th at pp. 1457–1460.)

In view of these dispositive conclusions, we find it unnecessary to discuss any additional arguments of the parties.

[*1108] III. DISPOSITION

The judgment granting the petition for writ of mandate on the first issue of the petition **[**90]** is reversed. The cause is remanded to the superior court for determination of the second and third issues of the petition. [13] Each party shall bear its own costs of this appeal.

FOOTNOTES

[13] We are not expressing any view about the two remaining issues. This opinion should not be seen as a harbinger of issues not yet decided.

[*42]** Swager, J., and Mangules, J., concurred.

A petition for a rehearing was denied June 27, 2003, and respondents' petition for review by the Supreme Court was denied September 24, 2003. Kennard, J., did not participate therein.

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EXHIBIT K

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Practitioner's Toolbox

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 28 OF THE 2011 SESSION ***
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ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 2. Definitions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 13050 (2011)

§ 13050. Terms used in this division

As used in this division:

(a) "State board" means the State Water Resources Control Board.

(b) "Regional board" means any California regional water quality control board for a region as specified in Section 13200.

(c) "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law.

(d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

(f) "Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

(g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.

(h) "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.

(i) "Water quality control" means the regulation of any activity or factor which may affect the

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quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.

(j) "Water quality control plan" consists of a designation or establishment for the waters within a specified area of all of the following:

(1) Beneficial uses to be protected.

(2) Water quality objectives.

(3) A program of implementation needed for achieving water quality objectives.

(k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l)

(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

(m) "Nuisance" means anything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(n) "Recycled water" means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource.

(o) "Citizen or domiciliary" of the state includes a foreign corporation having substantial business contacts in the state or which is subject to service of process in this state.

(p)

(1) "Hazardous substance" means either of the following:

(A) For discharge to surface waters, any substance determined to be a hazardous substance pursuant to Section 311(b)(2) of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.).

(B) For discharge to groundwater, any substance listed as a hazardous waste or hazardous material pursuant to Section 25140 of the Health and Safety Code, without regard to whether the substance is intended to be used, reused, or discarded, except that "hazardous substance"

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does not include any substance excluded from Section 311(b)(2) of the Federal Water Pollution Control Act because it is within the scope of Section 311(a)(1) of that act.

(2) "Hazardous substance" does not include any of the following:

(A) Nontoxic, nonflammable, and noncorrosive stormwater runoff drained from underground vaults, chambers, or manholes into gutters or storm sewers.

(B) Any pesticide which is applied for agricultural purposes or is applied in accordance with a cooperative agreement authorized by Section 116180 of the Health and Safety Code, and is not discharged accidentally or for purposes of disposal, the application of which is in compliance with all applicable state and federal laws and regulations.

(C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act.

(D) Any discharge to land which results, or probably will result, in a discharge to groundwater if the amount of the discharge to land is less than a reportable quantity, as determined by regulations adopted pursuant to Section 13271, for substances listed as hazardous pursuant to Section 25140 of the Health and Safety Code. No discharge shall be deemed a discharge of a reportable quantity until regulations set a reportable quantity for the substance discharged.

(q)

(1) "Mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Section 2732 of the Public Resources Code, and tailings, slag, and other processed waste materials, including cementitious materials that are managed at the cement manufacturing facility where the materials were generated.

(2) For the purposes of this subdivision, "cementitious material" means cement, cement kiln dust, clinker, and clinker dust.

(r) "Master recycling permit" means a permit issued to a supplier or a distributor, or both, of recycled water, that includes waste discharge requirements prescribed pursuant to Section 13263 and water recycling requirements prescribed pursuant to Section 13523.1.

History:

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1969 ch 800 § 2.5; Stats 1970 ch 202 § 1; Stats 1980 ch 877 § 1; Stats 1989 ch 642 § 2; Stats 1991 ch 187 § 1 (AB 673); Stats 1992 ch 211 § 1 (AB 3012); Stats 1995 ch 28 § 17 (AB 1247), ch 847 § 2 (SB 206); Stats 1996 ch 1023 § 429 (SB 1497), effective September 29, 1996.

Notes:

1. Editor's Notes
2. Amendments
3. Historical Derivation
4. Editor's Notes

1.

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finding that the failure of the regional board to act was inappropriate or improper, the state board may direct that appropriate action be taken by the regional board, refer the matter to another state agency having jurisdiction, take appropriate action itself, or take any combination of those actions. In taking any action, the state board is vested with all the powers of the regional boards under this division.

ARTICLE 4. WASTE DISCHARGE REQUIREMENTS

§ 13260. Reports; fees; exemptions

(a) All of the following persons shall file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board:

(1) Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.

(2) Any person who is a citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste, outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.

(3) Any person operating, or proposing to construct, an injection well.

(b) No report of waste discharge need be filed pursuant to subdivision (a) if the requirement is waived pursuant to Section 13269.

(c) Every person subject to subdivision (a) shall file with the appropriate regional board a report of waste discharge relative to any material change or proposed change in the character, location, or volume of the discharge.

(d)(1)(A) Each person who is subject to subdivision (a) or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs may include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out these actions.

(D) In establishing the amount of a fee that may be imposed on any confined animal feeding and holding operation pursuant to this section, including, but not limited to, any dairy farm, the state board shall consider all of the following factors:

(i) The size of the operation.

(ii) Whether the operation has been issued a permit to operate pursuant to Section 1342 of Title 33 of the United States Code.

(iii) Any applicable waste discharge requirement or conditional waiver of a waste discharge requirement.

(iv) The type and amount of discharge from the operation.

(v) The pricing mechanism of the commodity produced.

(vi) Any compliance costs borne by the operation pursuant to state and federal water quality regulations.

(vii) Whether the operation participates in a quality assurance program certified by a regional water quality control board, the state board, or a federal water quality control agency.

(2)(A) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund, which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, solely for the purposes of carrying out this division.

(B)(i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

(ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region.

(iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

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(3) Any person who would be required to pay the annual fee prescribed by paragraph (1) for waste discharge requirements applicable to discharges of solid waste, as defined in Section 40191 of the Public Resources Code, at a waste management unit that is also regulated under Division 30 (commencing with Section 40000) of the Public Resources Code, shall be entitled to a waiver of the annual fee for the discharge of solid waste at the waste management unit imposed by paragraph (1) upon verification by the state board of payment of the fee imposed by Section 48000 of the Public Resources Code, and provided that the fee established pursuant to Section 48000 of the Public Resources Code generates revenues sufficient to fund the programs specified in Section 48004 of the Public Resources Code and the amount appropriated by the Legislature for those purposes is not reduced.

(e) Each person discharges [sic] waste in a manner regulated by this section shall pay an annual fee to the state board. The state board shall establish, by regulation, a timetable for the payment of the annual fee. If the state board or a regional board determines that the discharge will not affect, or have the potential to affect, the quality of the waters of the state, all or part of the annual fee shall be refunded.

(f)(1) The state board shall adopt, by emergency regulations, a schedule of fees authorized under subdivision (d). The total revenue collected each year through annual fees shall be set at an amount equal to the revenue levels set forth in the Budget Act for this activity. The state board shall automatically adjust the annual fees each fiscal year to conform with the revenue levels set forth in the Budget Act for this activity. If the state board determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the Budget Act, the state board may further adjust the annual fees to compensate for the over and under collection of revenue.

(2) The emergency regulations adopted pursuant to this subdivision, any amendment thereto, or subsequent adjustments to the annual fees, shall be adopted by the state board in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the state board, or adjustments to the annual fees made by the state board pursuant to this section, shall not be subject to review by the Office of Administrative Law and shall remain in effect until revised by the state board.

(g) The state board shall adopt regulations setting forth reasonable time limits within which the regional board shall determine the adequacy of a report of waste discharge submitted under this section.

(h) Each report submitted under this section shall be sworn to, or submitted under penalty of perjury.

(i) The regulations adopted by the state board pursuant to subdivision (f) shall include a provision that annual fees shall not be imposed on those who pay fees under the national pollutant discharge elimination system until the time when those fees are again due, at which time the fees shall become due on an annual basis.

(j) Any person operating or proposing to construct an oil, gas, or geothermal injection well subject to paragraph (3) of subdivision (a), shall not be required to pay a fee pursuant to subdivision (d), if the injection well is regulated by the Division of Oil and Gas of the Department of Conservation, in lieu of the appropriate California regional water quality control board, pursuant to the memorandum of understanding, entered into between the state board and the Department of Conservation on May 19, 1988. This subdivision shall remain operative until the memorandum of understanding is revoked by the state board or the Department of Conservation.

(k) In addition to the report required by subdivision (a), before any person discharges mining waste, the person shall first submit both of the following to the regional board:

(1) A report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination. The report shall include the results of all tests required by regulations adopted by the board, any test adopted by the Department of Toxic Substances Control pursuant to Section 25141 of the Health and Safety Code for extractable, persistent, and bioaccumulative toxic substances in a waste or other material, and any other tests that the state board or regional board may require, including, but not limited to, tests needed to determine the acid-generating potential of the mining waste or the extent to which hazardous substances may persist in the waste after disposal.

(2) A report that evaluates the potential of the discharge of the mining waste to produce, over the long term, acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.

(l) Except upon the written request of the regional board, a report of waste discharge need not be filed pursuant to subdivision (a) or (c) by a user of recycled water that is being supplied by a supplier or distributor of recycled water for whom a master recycling permit has been issued pursuant to Section 13523.1.

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§ 13260.2. Fee for no exposure certifications

(a) The state board shall establish a fee in an amount sufficient to recover its costs in reviewing, processing, and enforcing "no exposure" certifications issued to facilities that apply for those certifications in accordance with a general industrial stormwater permit.

(b) Revenue generated pursuant to this section shall be deposited in the Waste Discharge Permit Fund.

§ 13260.3. Fee Report

On or before January 1 of each year, the state board shall report to the Governor and the Legislature on the expenditure of annual fees collected pursuant to Section 13260.

§ 13261. Civil liability

(a) ~~Any~~A person ~~fails~~who fails to furnish a report or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b) (1) Civil liability may be administratively imposed by a regional board or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount ~~that may~~ not ~~exceed~~exceeding one thousand dollars ($1,000) for each day in which the violation occurs. ~~For purposes of this section only, the state board shall have the same authority and shall follow the same procedures as set forth in Article 2.5 (commencing with Section 13323) of Chapter 5, except that the executive director shall issue the complaint with review by the state board. Civil liability may~~Civil liability shall not be imposed by the regional board pursuant to this section if the state board has imposed liability against the same person for the same violation.

(2) Civil liability may be imposed by the superior court in accordance with Article 5 (commencing with Section 13350) and Article 6 (commencing with Section 13360) of Chapter 5 for a violation of subdivision (a) in an amount ~~that may~~ not ~~exceed~~exceeding five thousand dollars ($5,000) for each day the violation occurs.

(c) ~~Any~~A person ~~discharging or proposing~~who discharges or proposes to discharge hazardous waste, as defined in Section 25117 of the Health and Safety Code, who knowingly furnishes a false report under Section 13260, or who either willfully fails to furnish a report or willfully withholds material information under Section 13260 despite actual knowledge of that requirement, may be liable in accordance with subdivision (d) and is guilty of a misdemeanor.

This subdivision does not apply to any waste discharge that is subject to Chapter 5.5 (commencing with Section 13370).

(d) (1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (c) in an amount ~~that may~~ not ~~exceed~~exceeding five thousand dollars ($5,000) for each day the violation occurs.

(2) Civil liability may be imposed by the superior court in accordance with Article 5 (commencing with Section 13350) and Article 6 (commencing with Section 13360) of Chapter 5 for a violation of subdivision (c) in an amount ~~that may~~ not ~~exceed~~exceeding twenty-five thousand dollars ($25,000).

§ 13262. Injunctive relief

The Attorney General, at the request of the regional board or the state board, shall petition the superior court for the issuance of a temporary restraining order, temporary injunction, or permanent injunction, or combination thereof, as may be appropriate, requiring any person not complying with Section 13260 to comply therewith.

§ 13263. Requirements for discharge

(a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.

(b) A regional board, in prescribing requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters.

(c) The requirements may contain a time schedule, subject to revision in the discretion of the board.

(d) The regional board may prescribe requirements although no discharge report has been filed.

(e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.

(f) The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of the notice, the person so notified shall provide adequate means to meet the requirements.

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(g) No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.

(h) The regional board may incorporate the requirements prescribed pursuant to this section into a master recycling permit for either a supplier or distributor, or both, of recycled water.

(i) The state board or a regional board may prescribe general waste discharge requirements for a category of discharges if the state board or that regional board finds or determines that all of the following criteria apply to the discharges in that category:

(1) The discharges are produced by the same or similar operations.

(2) The discharges involve the same or similar types of waste.

(3) The discharges require the same or similar treatment standards.

(4) The discharges are more appropriately regulated under general discharge requirements than individual discharge requirements.

(j) The state board, after any necessary hearing, may prescribe waste discharge requirements in accordance with this section.

§ 13263.1. Mining waste

Before a regional board issues or revises waste discharge requirements pursuant to Section 13263 for any discharge of mining waste, the regional board shall first determine that the proposed mining waste discharge is consistent with a waste management strategy that prevents the pollution or contamination of the waters of the state, particularly after closure of any waste management unit for mining waste.

§ 13263.2. Groundwater treatment facilities

The owner or operator of a facility that treats groundwater which qualifies as a hazardous waste pursuant to Chapter 6.5 (commencing with Section 25100) of Division 20 of the Health and Safety Code is exempt from the requirement to obtain a hazardous waste facility permit pursuant to Section 25201 of the Health and Safety Code for the treatment of groundwater if all of the following conditions are met:

(a) The facility treats groundwater which is extracted for the purposes of complying with one or more of the following:

(1) Waste discharge requirements prescribed pursuant to Section 13263.

(2) A cleanup or abatement order issued pursuant to Section 13304.

(3) A written authorization issued by a regional board or local agency designated pursuant to Section 25283 of the Health and Safety Code.

(4) An order or approved remedial action plan issued pursuant to Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.

(b) The facility meets, at a minimum, all of the following operating standards:

(1) The treatment does not require a hazardous waste facilities permit pursuant to the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sec. 6901 et seq.).

(2) The facility operator prepares and maintains written operating instructions and a record of the dates, amounts, and types of waste treated.

(3) The facility operator prepares and maintains a written inspection schedule and log of inspections conducted.

(4) The records specified in paragraphs (2) and (3) are maintained by the owner or operator of the facility for a period of three years.

(5) The owner or operator maintains adequate records to demonstrate that it is in compliance with all of the pretreatment standards and with all of the applicable industrial waste discharge requirements issued by the agency operating the publicly owned treatment works into which the wastes are discharged.

(6)(A) Upon terminating the operation of any treatment process or unit exempted pursuant to this section, the owner or operator that conducted the treatment removes or decontaminates all waste residues, containment system components, soils, and other structures or equipment contaminated with hazardous waste from the unit. The removal of the unit from service shall be conducted in a manner that does both of the following:

(i) Minimizes the need for further maintenance.

(ii) Eliminates the escape of hazardous waste, hazardous constituents, leachate, contaminated runoff, or waste decomposition products to the environment after the treatment process ceases operation.

(B) Any owner or operator who permanently ceases operation of a treatment process or unit that is exempted pursuant to this section shall provide written notification

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WATER CODE
SECTION 13290-13291.7

13290. For the purposes of this chapter:

(a) "Local agency" means any of the following entities:

(1) A city, county, or city and county.

(2) A special district formed pursuant to general law or special act for the local performance of functions regarding onsite sewage treatment systems within limited boundaries.

(b) "Onsite sewage treatment systems" includes individual disposal systems, community collection and disposal systems, and alternative collection and disposal systems that use subsurface disposal.

13291. (a) On or before January 1, 2004, the state board, in consultation with the State Department of Public Health, the California Coastal Commission, the California Conference of Directors of Environmental Health, counties, cities, and other interested parties, shall adopt regulations or standards for the permitting and operation of all of the following onsite sewage treatment systems in the state and shall apply those regulations or standards commencing six months after their adoptions:

(1) Any system that is constructed or replaced.

(2) Any system that is subject to a major repair.

(3) Any system that pools or discharges to the surface.

(4) Any system that, in the judgment of a regional board or authorized local agency, discharges waste that has the reasonable potential to cause a violation of water quality objectives, or to impair present or future beneficial uses of water, to cause pollution, nuisance, or contamination of the waters of the state.

(b) Regulations or standards adopted pursuant to subdivision (a), shall include, but shall not be limited to, all of the following:

(1) Minimum operating requirements that may include siting, construction, and performance requirements.

(2) Requirements for onsite sewage treatment systems adjacent to impaired waters identified pursuant to subdivision (d) of Section 303 of the Clean Water Act (33 U.S.C. Sec. 1313(d)).

(3) Requirements authorizing a qualified local agency to implement those requirements adopted under this chapter within its jurisdiction if that local agency requests that authorization.

(4) Requirements for corrective action when onsite sewage treatment systems fail to meet the requirements or standards.

(5) Minimum requirements for monitoring used to determine system or systems performance, if applicable.

(6) Exemption criteria to be established by regional boards.

(7) Requirements for determining a system that is subject to a major repair, as provided in paragraph (2) of subdivision (a).

(c) This chapter does not diminish or otherwise affect the authority of a local agency to carry out laws, other than this chapter, that relate to onsite sewage treatment systems.

(d) This chapter does not preempt any regional board or local agency from adopting or retaining standards for onsite sewage

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treatment systems that are more protective of the public health or the environment than this chapter.

(e) Each regional board shall incorporate the regulations or standards adopted pursuant to subdivisions (a) and (b) into the appropriate regional water quality control plans.

13291.5. It is the intent of the Legislature to assist private property owners with existing systems who incur costs as a result of the implementation of the regulations established under this section by encouraging the state board to make loans under Chapter 6.5 (commencing with Section 13475) to local agencies to assist private property owners whose cost of compliance with these regulations exceeds one-half of one percent of the current assessed value of the property on which the onsite sewage system is located.

13291.7. Nothing in this chapter shall be construed to limit the land use authority of any city, county, or city and county.

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WATER CODE
SECTION 13367

13367. (a) For purposes of this chapter, "preproduction plastic" includes plastic resin pellets and powdered coloring for plastics.

(b) (1) The state board and the regional boards shall implement a program to control discharges of preproduction plastic from point and nonpoint sources. The state board shall determine the appropriate regulatory methods to address the discharges from these point and nonpoint sources.

(2) The state board, when developing this program, shall consult with any regional board with plastic manufacturing, handling, and transportation facilities located within the regional board's jurisdiction that has already voluntarily implemented a program to control discharges of preproduction plastic.

(c) The program control measures shall, at a minimum, include waste discharge, monitoring, and reporting requirements that target plastic manufacturing, handling, and transportation facilities.

(d) The program shall, at a minimum, require plastic manufacturing, handling, and transportation facilities to implement best management practices to control discharges of preproduction plastics. A facility that handles preproduction plastic shall comply with either subdivision (e) or the criteria established pursuant to subdivision (f).

(e) At a minimum, the state board shall require the following best management practices in all permits issued under the national pollutant discharge elimination system (NPDES) program that regulate plastic manufacturing, handling, or transportation facilities:

(1) Appropriate containment systems shall be installed at all onsite storm drain discharge locations that are down-gradient of areas where preproduction plastic is present or transferred. A facility shall install a containment system that is defined as a device or series of devices that traps all particles retained by a one millimeter mesh screen and has a design treatment capacity of not less than the peak flowrate resulting from a one-year, one-hour storm in each of the down-gradient drainage areas. When the installation of a containment system is not appropriate because one or more of a facility's down-gradient drainage areas is not discharged through a stormwater conveyance system, or when the regional board determines that a one millimeter or similar mesh screen is not appropriate at one or more down-gradient discharge locations, the regulated facility shall identify and propose for approval by the regional board technically feasible alternative storm drain control measures that are designed to achieve the same performance as a one millimeter mesh screen.

(2) At all points of preproduction plastic transfer, measures shall be taken to prevent discharge, including, but not limited to, sealed containers durable enough so as not to rupture under typical loading and unloading activities.

(3) At all points of preproduction plastic storage, preproduction plastic shall be stored in sealed containers that are durable enough so as not to rupture under typical loading and unloading activities.

(4) At all points of storage and transfer of preproduction

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plastic, capture devices shall be in place under all transfer valves and devices used in loading, unloading, or other transfer of preproduction plastic.

(5) A facility shall make available to its employees a vacuum or vacuum type system, for quick cleanup of fugitive preproduction plastic.

(f) The state board shall include criteria for submitting a no exposure certification pursuant to Section 122.26(g) of Title 40 of the Code of Federal Regulations in all NPDES permits regulating plastic manufacturing, handling, or transportation facilities. Facilities that satisfy the no exposure certification criteria are conditionally exempt from the permitting requirements pursuant to Section 122.26 of Title 40 of the Code of Federal Regulations. The no exposure certification shall be required every five years or more frequently as determined by the state board or a regional board.

(g) The state board and the regional boards shall implement this chapter by January 1, 2009.

(h) Nothing in this chapter limits the authority of the state board or the regional boards to establish requirements in addition to the best management practices for the elimination of discharges of preproduction plastic.

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1990 (16 U.S.C. Sec. 1455b), and this division in the preparation of this detailed implementation program.

(2)(A) The program shall include all of the following components:

(i) Nonregulatory implementation of best management practices.

(ii) Regulatory-based incentives for best management practices.

(iii) The adoption and enforcement of waste discharge requirements that will require the implementation of best management practices.

(B) In connection with its duties under this subdivision to prepare and implement the state's nonpoint source management plan, the state board shall develop, on or before February 1, 2001, guidance to be used by the state board and the regional boards for the purpose of describing the process by which the state board and the regional boards will enforce the state's nonpoint source management plan, pursuant to this division.

(C) The adoption of the guidance developed pursuant to this section is not subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) The state board, in consultation with the California Coastal Commission and other appropriate agencies, as necessary, on or before December 31 of each year, shall submit to the Legislature, and make available to the public, both of the following:

(1) Copies of all state and regional board reports that contain information related to nonpoint source pollution and that the state or regional boards were required to prepare in the previous fiscal year pursuant to Sections 303, 305(b), and 319 of the Clean Water Act (33 U.S.C. Secs. 1313, 1315(b), and 1329), Section 6217 of the federal Coastal Zone Act Reauthorization Amendments of 1990 (16 U.S.C. Sec. 1455b), related regulations, and this division.

(2) A summary of information related to nonpoint source pollution that is set forth in the reports described pursuant to paragraph (1) including, but not limited to, summaries of both of the following:

(A) Information that is related to nonpoint source pollution and that is required to be included in reports prepared pursuant to Section 305(b) of the Clean Water Act (33 U.S.C. 1315(b)).

(B) Information that is required to be in reports prepared pursuant to Section 319(h)(11) of the Clean Water Act (33 U.S.C. Sec. 1329(h)(11)).

CHAPTER 5.5. COMPLIANCE WITH THE PROVISIONS OF THE FEDERAL WATER POLLUTION CONTROL ACT AS AMENDED IN 1972

§ 13370. Legislative intent

The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

§ 13370.5. Legislative findings

(a) The Legislature finds and declares that, since the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, and applicable federal regulations (40 C.F.R. § 403 et seq.) provide for a pretreatment program to regulate the discharge of pollutants into publicly owned treatment works and provide that states with approved national pollutant discharge elimination system (NPDES) permit programs shall apply for approval of a state pretreatment program, it is in the interest of the people of the state to enact this section in order to avoid direct regulation by the federal government of publicly owned treatment works already subject to regulation under state law pursuant to this division.

(b) The state board shall develop a state pretreatment program and shall, not later than September 1, 1985, apply to the Environmental Protection Agency for approval of the pretreatment program in accordance with federal requirements.

§ 13372. Consistency

(a) This chapter shall be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act and acts

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EXHIBIT L

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*235 Ore. App. 132, *; 230 P.3d 559, **;*
*2010 Ore. App. LEXIS 465, ****

TUALATIN RIVERKEEPERS, an Oregon non-profit corporation; WILLAMETTE RIVERKEEPER, an Oregon non-profit corporation; COLUMBIA RIVERKEEPER, an Oregon non-profit corporation; and LIZ CALLISON, Petitioners-Appellants, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an Agency of the State of Oregon; and OREGON ENVIRONMENTAL QUALITY COMMISSION, a Commission of the State of Oregon, Respondents-Respondents, and CLEAN WATER SERVICES, CITY OF PORTLAND, PORT OF PORTLAND, COUNTY OF MULTNOMAH, COUNTY OF CLACKAMAS, CLACKAMAS COUNTY SERVICE DISTRICT NUMBER ONE, SURFACE WATER MANAGEMENT AGENCY OF CLACKAMAS COUNTY, CITY OF GLADSTONE, CITY OF HAPPY VALLEY, CITY OF LAKE OSWEGO, CITY OF MILWAUKIE, CITY OF OREGON CITY, CITY OF RIVER GROVE, CITY OF WEST LINN, CITY OF WILSONVILLE, OAK LODGE SANITARY DISTRICT, CITY OF GRESHAM, and CITY OF FAIRVIEW, Intervenors-Respondents.

A136050

COURT OF APPEALS OF OREGON

235 Ore. App. 132; 230 P.3d 559; 2010 Ore. App. LEXIS 465

May 11, 2009, Argued and Submitted
April 28, 2010, Filed

SUBSEQUENT HISTORY: Review denied by Riverkeepers v. Or. Dep't of Envtl. Quality, 2010 Ore. LEXIS 803 (Or., Oct. 21, 2010)

PRIOR HISTORY: [*1]**
Multnomah County Circuit Court 060100752. Christopher J. Marshall, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Multnomah County Circuit Court, Oregon, granted summary judgment in favor of respondent Oregon Department of Environmental Quality (DEQ) and Oregon Environmental Quality Commission (EQC) (respondent), on petitioner non-profits' judicial review of **municipal storm water** permits issued by respondent pursuant to Or. Rev. Stat. § 468B.050 and the federal **Clean Water Act,** 33 **U.S.C.S.** § 1342. The non-profits appealed.

OVERVIEW: The non-profits argued that, because the permits did not ensure that the allowed discharges would comply with and protect Water Quality Standards, respondent's issuance of those permits violated the requirements of Or. Rev. Stat. § 468B.025(1)(b) and Or. Admin. R. 340-045-0015(5)(c). The appellate court found that the only express requirement included in Or. Rev. Stat. § 468B.050 as to the issuance of permits thereunder was that such permits "shall specify applicable effluent limitations." A statutory requirement that **storm water** permits include effluent limitations was not the same as a requirement that the permits mandate compliance with state water quality standards. The legislature intended to delegate the responsibility for appropriately implementing its policies to the agency. The plain text of Or. Rev. Stat. § 468B.025(1)(b) did not require respondent to include in its **storm water** permits specific conditions mandating compliance with state water quality standards. The permits did not violate the requirements of Or. Admin. R. 340-045-0015(5) or Or. Rev. Stat. § 468B.050. The permits met the requirement that wasteload allocations be incorporated into permit requirements.

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OUTCOME: The judgment was affirmed.

CORE TERMS: storm, water quality, wasteload, municipal, pollutant, effluent, pollution, permittee, permit requirement, Clean Water Act, issuance of permits, storm sewer, permits issued, benchmark, maximum, load, point sources, practicable, reduction, specify, numeric, loading, adaptive, provision of law, petitioners' assertion, judicial review, applicable federal, progress toward, dischargers, regulated

LEXISNEXIS(R) HEADNOTES

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN1 Discharges from **municipal** separate **storm sewer** systems serving populations of more than 100,000 people were subject to a permit requirement, 33 **U.S.C.S.** § 1342(p)(2)(C) - (D). The permit requirement now applies to an even larger range of **municipal storm water** dischargers: Or. Admin. R. 340-045-015(2) provides that, without first obtaining a National **Pollutant** Discharge Elimination System permit, a person may not discharge into navigable waters **storm water** subject to permit requirements in 40 CFR § 122.26 or § 122.33, including **storm water** from large, medium, and regulated small **municipal** separate **storm sewer** systems.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN2 A **municipal** separate **storm sewer** is a conveyance or system of conveyances including roads with drainage systems, **municipal** streets, catch basins, curbs, gutter[s], ditches, manmade channels, or **storm** drains that is owned or operated by a state, city, county, district, association, or other public body; is designed or used for collecting or conveying **storm water;** and is not a combined sewer or part of a Publicly Owned Treatment Works as defined in 40 CFR § 122.2, Or. Admin. R. 340-045-0010(10).

Administrative Law > Judicial Review > Standards of Review > General Overview

HN3 Or. Rev. Stat. § 183.484(5) provides the criteria for judicial review of orders in other than contested cases.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN4 See Or. Rev. Stat. § 183.484(5).

Governments > Legislation > Interpretation

HN5 The appellate court looks first at the statute, which it construes by examining its text, context, and any legislative history submitted by the parties, giving the legislative history the weight, if any, that the appellate court concludes it merits.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN6 See Or. Rev. Stat. § 468B.025.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN7 Or. Rev. Stat. § 468B.050, authorizes the Oregon Department of Environmental Quality to issue permits and sets out circumstances in which a permit is required.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

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HN8 On its face, Or. Rev. Stat. § 468B.025 does not set forth standards for the issuance of permits or describe what conditions a permit must contain. Instead, it lists several activities that no person shall engage in. Those are (1) violating the conditions of a permit issued pursuant to Or. Rev. Stat. § 468B.050; (2) except as provided in Or. Rev. Stat. § 468B.050 or Or. Rev. Stat. § 468B.053, causing pollution of the waters of the state, or causing waste to be placed in a location where it is likely to enter the waters of the state; and (3) except as provided in Or. Rev. Stat. § 468B.050 or Or. Rev. Stat. § 468B.053, discharging waste into the waters of the state if the discharge reduces the quality of those waters below state water quality standards. None of those provisions directly governs the Oregon Department of Environmental Quality's issuance of permits.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN9 The prohibition on discharges that reduce the receiving water below state water quality standards is not absolute. Or. Rev. Stat. § 468B.025(1)(b) specifically refers to the permit section of the statute, providing that, except as provided in Or. Rev. Stat. § 468B.050 or 468B.053, persons may not discharge waste into the water if those discharges reduce the water quality below applicable state water quality standards. Under § 468B.050, the Department of Environmental Quality (DEQ) is authorized to issue a permit allowing the discharge of wastes into the waters of the state. Alternatively, under Or. Rev. Stat. § 468B.053, the Environmental Quality Commission may exempt de minimis discharges from the permits required under § 468B.025 or 468B.050. The statutes prohibit any person from discharging wastes into the waters of the state if those discharges would reduce the quality of that water below the state's water quality standards unless the person has a permit from DEQ specifically authorizing the discharge at issue. Neither statute requires that permits issued must contain provisions mandating compliance with water quality standards. The statutes generally give respondent discretion in those areas. Indeed, the only express requirement included in § 468B.050 as to the issuance of permits thereunder is that such permits shall specify applicable effluent limitations.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN10 Pursuant to Or. Rev. Stat. § 468B.053(2), the Oregon Quality Commission may exempt from permit requirements subsurface injection of fluids that are authorized under the underground injection control program of the Department of Environmental Quality. Also, Or. Rev. Stat. § 468B.050 references Or. Rev. Stat. § 468B.215, pursuant to which, except for an animal feeding operation subject to regulation under 33 **U.S.C.S.** § 1342, a fee shall not be assessed to nor permit required under § 468B.050(1)(d) of confined animal feeding operations of four months or less duration or that do not have waste water control facilities.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN11 Federal law generally requires that discharges pursuant to National **Pollutant** Discharge Elimination System (NPDES) permits must strictly comply with state water quality standards, 33 **U.S.C.S. § 1311(**b)(1)(C), However, under 33 **U.S.C.S.** § **1342(p)(3)(B)**, dischargers of **municipal storm water** are not subject to that requirement. Instead, federal law requires that NPDES permits relating to **municipal storm water** discharges require reduction of the discharge of **pollutants** to the **maximum** extent **practicable,** 33 **U.S.C.S.** § **1342(p)(3)(B)**(iii).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN12 See Or. Rev. Stat. § 468B.030.

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Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

HN13 The **Clean Water Act** defines "effluent limitation" as "any restriction established by a State or the **Administrator** on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance, 33 **U.S.C.S.** § 1362(11). Thus, although a permit must include restrictions on discharges of **pollutants** into the water, the applicable statute does not specify what form they must take. "Best management practices" are a type of effluent limitation. A statutory requirement that **storm water** permits include effluent limitations is not the same as a requirement that the permits mandate compliance with state water quality standards.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN14 Or. Rev. Stat. § 468B.015 sets forth the policies of the state to (1) conserve the waters of the state, (2) protect and improve water quality, (3) provide for treatment or other corrective action before waste is discharged into the water, (4) prevent and control pollution, and (5) cooperate with other agencies, states, and the federal government. In order to carry out that policy, the legislature granted broad authority to respondent: (2) In order to carry out the public policy set forth in § 468B.015, the Department of Environmental Quality shall take such action as is necessary for the prevention of new pollution and the abatement of existing pollution by: (a) Fostering and encouraging the cooperation of the people, industry, cities and counties, in order to prevent, control and reduce pollution of waters of the state; and (b) Requiring the use of all available and reasonable methods necessary to achieve the purposes of § 468B.015 and to conform to the standards of water quality and purity established under Or. Rev. Stat. § 468B.048.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN15 Instead of including many specific requirements regarding the issuance of permits, the legislature intended to delegate the responsibility for appropriately implementing its policies to the agency. That context, in turn, supports the conclusion that the plain text of Or. Rev. Stat. § 468B.025(1)(b) does not require the Oregon Department of Environmental Quality to include in its **storm water** permits specific conditions mandating compliance with state water quality standards.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN16 Administrative rules are interpreted under the same analytical framework the appellate court applies when construing statutes. The appellate court defers to an agency's interpretation of its own rule if that interpretation is plausible and not inconsistent with the text of the rule, its context, or some other source of law.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN17 Pursuant to Or. Admin. R. 340-045-0015(5): Each person required by sections (1) and (2) of this rule to obtain a permit must: (a) Promptly apply to the Department for the permit; (b) Fulfill all terms and conditions of the permit issued; (c) Comply with applicable federal and state requirements, effluent standards, and limitations including but not limited to those contained in or promulgated pursuant to Sections 204, 301, 302, 304, 306, 307, 402, and 403 of the **Clean Water Act** and applicable federal and state water quality standards.

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Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN18 See Or. Admin. R. 340-045-0015(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN19 Like Or. Rev. Stat. § 468B.025, the text of Or. Admin. R. 340-045-0015(5), does not, by its terms, regulate the issuance of permits by the agency. Instead, it requires persons who must obtain permits pursuant to sections (1) and (2) of the rule to do certain things. Namely, those persons must apply for the required permit promptly, fulfill the terms and conditions of the permit, and comply with applicable federal and state requirements and standards. On its face, the rule says nothing about what must be included in a permit, nor does it impose particular conditions on the issuance of permits. In contrast, other rules do impose requirements on the Department of Environmental Quality (DEQ) with respect to the issuance of permits. Or. Admin. R. 340-045-0035, which governs the issuance of the type of permit at issue in this case, imposes specific requirements on the DEQ.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN20 Or. Admin. R. 340-045-0015(5) does not itself make state water quality standards applicable to **storm water** dischargers. Instead, it simply requires compliance with "applicable" federal and state water quality standards. The text of the provision, thus, only requires that permittees comply with legal standards that some other source makes applicable to them. As we have observed, pursuant to federal and state statutes, permits for the discharge of **municipal storm water,** unlike other National **Pollutant** Discharge Elimination System permits, need not incorporate provisions requiring compliance with state water quality standards. In the context of **storm water,** permittees must implement best management practices to reduce the discharge of **pollutants** in **storm water** to the **maximum** extent **practicable.** Rule 340-045-0015(5) does not impose a stricter requirement. Instead, it simply requires that, to the extent that state water quality standards otherwise apply, a permittee must comply with them. Because those standards are not otherwise strictly applicable to **storm water,** the rule does not, itself, make them applicable.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

HN21 Or. Rev. Stat. § 468B.050 does not mandate that such effluent limitations take a particular form. A best management practices requirement is a type of effluent limitation.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > State Water Quality Certifications

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards

HN22 Or. Admin. R. 340-042-0080 is part of a set of rules adopted by the Department of Environmental Quality (DEQ) relating to total **maximum** daily loads (TMDLs). A TMDL is a written quantitative plan and analysis for attaining and maintaining water quality standards and includes the elements described in Or. Admin. R. 340-042-0040. These elements include a calculation of the **maximum** amount of a **pollutant** that a waterbody can receive and still meet state water quality standards, allocations of portions of that amount to the **pollutant** sources or sectors, and a Water Quality Management Plan to achieve water quality standards, Or. Admin. R. 340-042-0030(15). TMDLs are established for **pollutants** in waters of the state that are identified, pursuant to 33 **U.S.C.S.** § 1313(d), as being water quality impaired, Or. Admin. R. 340-042-0040(1). Among other things TMDLs must include loading

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capacities (the amount of a **pollutant** that a waterbody can receive and still meet water quality standards), wasteload allocations (the portions of the receiving water's loading capacity allocated to particular point sources), and a water quality management plan (a framework of management strategies to attain and maintain water quality standards, including proposed strategies to meet wasteload allocations in the TMDL), Or. Admin. R. 340-042-0040(4).

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HN23 As part of the implementation of total **maximum** daily loads (TDMLs), for sources subject to permit requirements in Or. Rev. Stat. § 468B.050, wasteload allocations and other management strategies will be incorporated into permit requirements, Or. Admin. R. 340-042-0080(4). In relation to TMDLs, the term "wasteload allocation" is defined, by rule, to mean the portion of [the] receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. Wasteload allocations constitute a type of water **quality-based** effluent limitation, Or. Admin. R. 340-041-0002(67). However, the rule does not specifically provide the manner in which those wasteload allocations must be implemented.

COUNSEL: Christopher Winter argued the cause for appellants. With him on the joint briefs were Crag Law Center and Brent Foster.

Erin C. Lagesen, Assistant Attorney General, argued the cause for respondents. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Jay T. Waldron argued the cause for intervenors-respondents. With him on the joint brief were Laura Maffei, Andrew J. Lee and Schwabe, Williamson & Wyatt, P.C.; G. Kevin Kiely, James Kincaid, Carla Scott, and Cable Huston Benedict Haagensen & Lloyd LLP; David Doughman and Beery Elsner & Hammond LLP; and David Ris and Gresham City Attorney's Office.

James J. Nicita filed the brief *amicus curiae* for Northwest Environmental Defense Center, Northwest Environmental Advocates, Native Fish Society, Friends of the Clackamas River, and Barbara Kemper.

JUDGES: Before Wollheim, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge. *

* Brewer, C. J., *vice* Edmonds, P. J.

OPINION BY: SERCOMBE

OPINION

[560]** **[*135]** SERCOMBE, J.

Petitioners sought judicial review of several **municipal storm water** permits issued by respondent [1] pursuant to ORS 468B.050 and the federal **[***2] Clean Water Act**, *see* 33 USC § 1342. [2] They appeal following the trial court's grant of summary judgment in favor of respondent, contending that, in issuing the permits, respondent acted inconsistently with the requirements of ORS 468B.025(1)(b) and OAR 340-045-0015(5)(c), **[**561]** as well as ORS 468B.050 and OAR 340-042-0080. We affirm.

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1 For ease of reference, we refer to Oregon Department of Environmental Quality (DEQ) and the Oregon Environmental Quality Commission (EQC), collectively, as "respondent."

2 The Federal Water Pollution Control Act, 33 USC §§ 1251 - 1376, is generally referred to as the **Clean Water Act**. National **Pollutant** Discharge Elimination System permits are issued pursuant to the **Clean Water Act**. They are specifically provided for in 33 USC section 1342.

The **storm water** permits at issue are all National **Pollutant** Discharge Elimination System (NPDES) permits, issued by respondent as part of the state's implementation of the **Clean Water Act**. *See* ORS 468B.035 (EQC "may perform or cause to be performed any acts necessary to be performed by the state to implement" the provisions of the **Clean Water Act**). Although **municipal storm water** was not initially regulated pursuant to the NPDES program, **[***3]** [3] eventually, the **Clean Water Act** was amended to explicitly require regulation of certain **storm water** discharges. *See American Min. Congress v. U.S.E.P.A.*, 965 F2d 759, 763 (9th Cir 1992) (discussing amendments to **Clean Water Act** requiring that regulation). After those amendments but prior to 1994, most discharges composed entirely of **storm water** did not require an NPDES permit. 33 USC § 1342(p)(1). However, HN1 discharges from **municipal** separate **storm sewer** systems [4] serving populations of more than 100,000 people were subject to a permit **[*136]** requirement. 33 USC § 1342(p)(2)(C) - (D). The permit requirement now applies to an even larger range of **municipal storm water** dischargers: OAR 340-045-015(2) provides that, "[w]ithout first obtaining an NPDES permit, a person may not discharge into navigable waters * * * **storm water** subject to permit requirements in 40 CFR § 122.26 or § 122.33, including **storm water** from large, medium, and regulated small **municipal** separate **storm sewer** systems[.]"

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3 For example, 40 CFR section 125.4(f) (1975) provided that, generally, no NPDES permit was required for "uncontrolled discharges composed entirely of **storm** runoff when these discharges are uncontaminated by **[***4]** any **industrial** or commercial activity[.]"

4 HN2 A **municipal** separate **storm sewer** is

> "a conveyance or system of conveyances including roads with drainage systems, **municipal** streets, catch basins, curbs, gutter[s], ditches, manmade channels, or **storm** drains that is owned or operated by a state, city, county, district, association, or other public body; is designed or used for collecting or conveying **storm water;** and is not a combined sewer or part of a Publicly Owned Treatment Works as defined in 40 CFR § 122.2."

OAR 340-045-0010(10); *see also* OAR 340-045-0010(11) ("**Municipal** Separate **Storm Sewer** System or MS4' means all **municipal** separate **storm sewers** that are defined as 'large,' 'medium,' or 'small' **municipal** separate **storm sewers** systems in 40 CFR § 122.26(b).").

The NPDES permits at issue in this case were issued by respondent and authorize the **municipal** permittees, who are intervenors in this judicial review proceeding, to

> "implement a **storm water** management program to reduce the contribution of **pollutants** in **storm water** to the **maximum** extent **practicable** (MEP), to address where applicable TMDL [total **maximum** daily load] wasteload allocations, and to discharge **storm water** to waters of the **[***5]** State, in conformance with all the requirements and conditions set forth in the attached schedules * * *." [5]

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[5] The permit issued to Clean Water Services contains slightly different language.

The permits mandate that the permittees "implement all applicable provisions in the **Storm Water** Management Plan (SWMP) as the associated Monitoring Program" and incorporate the SWMP by reference.

> "The SWMP and associated Monitoring Program include best management practices (BMPs), monitoring triggers, narrative conditions, adaptive management and other elements designed to reduce the introduction of pollutions into the waters of the State from [**municipal** separate **storm sewer** systems] to the **maximum** extent **practicable** (MEP). The SWMP also includes evaluation and reporting requirements designed to measure the effectiveness of BMPs and other programs."

[*137] Pursuant to those permits, the **municipal** permittees discharge **storm water** into a number of rivers and streams, including the Columbia, Willamette, and Tualatin Rivers.

Although the permits are extensive, it is undisputed that that they do not contain conditions stating that the **storm water** discharges must comply with state water quality standards. In addition, **[***6]** the permits do not specify wasteload allocations [6] in the form of **[**562]** numeric effluent limits; they instead incorporate benchmarks. They also require compliance with the SWMP, which, in turn, incorporates best management practices. It is the permits' lack of numeric limits and conditions requiring compliance with state water quality standards that gave rise to this case.

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[6] "Wasteload Allocation" refers to the portion of receiving water's loading capacity that is allocated to a particular source of pollution. *See* OAR 340-042-0040(4)(g) (a wasteload allocation "determines the portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated under the Federal Water Pollution Control Act Section 402 (33 USC Section 1342)" (emphasis omitted)); OAR 340-041-0002(67) (defining wasteload allocation).

On summary judgment, the trial court concluded that "the agency did not erroneously interpret a provision of law in issuing the final orders before the Court, that the agency's exercise of discretion was not inconsistent with an agency rule, and the agency's discretion was not outside the range of discretion delegated **[***7]** to the agency by law[.]" Accordingly, it entered a general judgment affirming the permits and dismissing the judicial review proceeding with prejudice. Petitioners seek review of that dismissal.

HN3 ORS 183.484(5) provides the criteria for judicial review of orders in other than contested cases: [7]

> *HN4* "(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
>
> "(A) Set aside or modify the order; or
>
> "(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

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of the provision of law.

[*138] "(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

"(A) Outside the range of discretion delegated to the agency by law;

"(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

"(C) Otherwise in violation of a constitutional or statutory provision.

"(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial **[***8]** evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."

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7 The **storm water** permits at issue are orders in other than a contested case. *See Wilbur Residents v. DEQ,* 176 Ore. App. 353, 354, 30 P3d 1228, *rev den,* 333 Ore. 73, 36 P.3d 974 (2001).

We review the trial court's judgment to determine whether it correctly assessed respondent's actions under the standards set forth in ORS 183.484(5). *See G.A.S.P. v. Environmental Quality Commission,* 198 Ore. App. 182, 187, 108 P.3d 95, *rev den,* 339 Ore. 230, 119 P.3d 790 (2005) (we review to determine compliance with the standards set forth in ORS 183.484(5)). The issues presented in this case are purely legal in nature. Thus, we review to determine whether, in issuing the permits, respondent "erroneously interpreted a provision of law" and whether respondent exercised its discretion "outside the range of discretion delegated" by law, or acted "inconsistent[ly] with an agency rule" or "otherwise in violation of * * * a statutory provision." ORS 183.484(5). Specifically, we examine the requirements of the statutory and regulatory provisions that petitioners contend respondent violated in issuing **[***9]** the permits.

In their first assignment of error, petitioners assert that, because the permits "do not ensure that the [allowed] discharges will comply with and protect Water Quality Standards," respondent's issuance of those permits violated the requirements of ORS 468B.025(1)(b) and OAR 340-045-0015(5)(c). [8] **[**563]** In essence, petitioners contend that, in light of **[*139]** ORS 468B.025, respondent was required to impose stricter permit requirements on **municipal storm water** discharges than are required pursuant to the federal scheme. HN5 We look first at the statute, which we construe by examining its text, context, and any legislative history submitted by the parties, giving the legislative history the weight, if any, that we conclude it merits. *State v. Gaines,* 346 Ore. 160, 171-72, 206 P3d 1042 (2009).

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8 Petitioners do not contend that the **municipal storm water** permits violate the requirements of federal law. In *Defenders of Wildlife v. Browner,* 191 F3d 1159, 1163 (9th Cir 1999), the court explained the background of the regulation of **municipal storm water** and explained the requirements of federal law with respect to such **storm water** and state water quality standards. The court held that permits providing **[***10]** for discharges of **municipal storm water** need not require strict compliance with state water quality standards under the federal law. Although the Environmental Protection Agency (EPA) has discretion to require such compliance as it determines appropriate, the federal statutory scheme requires only that

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such compliance as it determines appropriate, the federal statute) scheme requires **municipal storm water** dischargers "'reduce the discharge of **pollutants** to the **maximum** extent **practicable**, including management practices, control techniques and systems, design and **engineering** methods, and other such provisions as the **Administrator** * * * determines appropriate for the control of such **pollutants**.'" *Id.* at 1165 (quoting 33 USC § **1342(p)(3)(B)**(iii) (omission in original)).

ORS 468B.025 provides:

> HN6 "(1) Except as provided in ORS 468B.050 or 468B.053, no person shall:
>
> "(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.
>
> "(b) Discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.
>
> "(2) **[***11]** No person shall violate the conditions of any waste discharge permit issued under ORS 468B.050.
>
> "(3) Violation of subsection (1) or (2) of this section is a public nuisance."

HN7 ORS 468B.050, in turn, authorizes DEQ to issue permits and sets out circumstances in which a permit is required. *See also EQC v. City of Coos Bay*, 171 Ore. App. 106, 110, 14 P3d 649 (2000) ("ORS 468B.050(1)(a) specifies when it is necessary to obtain a permit[.]").

HN8 On its face, ORS 468B.025 does not set forth standards for the issuance of permits or describe what conditions a permit must contain. Instead, it lists several activities that **[*140]** "no person shall" engage in. Those are (1) violating the conditions of a permit issued pursuant to ORS 468B.050; (2) except as provided in ORS 468B.050 or ORS 468B.053, causing pollution of the waters of the state, or causing waste to be placed in a location where it is likely to enter the waters of the state; and (3) except as provided in ORS 468B.050 or ORS 468B.053, discharging waste into the waters of the state if the discharge reduces the quality of those waters below state water quality standards. None of those provisions directly governs DEQ's issuance of permits.

Furthermore, **[***12]** pursuant to the plain text of the statute at issue, in context, HN9 the prohibition on discharges that reduce the receiving water below state water quality standards is not absolute. On the contrary, as noted, ORS 468B.025(1)(b) specifically refers to the permit section of the statute, providing that, "[e]*xcept as provided in ORS 468B.050 or 468B.053,*" persons may not discharge waste into the water if those discharges reduce the water quality below applicable state water quality standards. (Emphasis added.) Under ORS 468B.050, DEQ is authorized to issue a permit allowing the discharge of wastes into the waters of the state. Alternatively, under ORS 468B.053, EQC may exempt *de minimis* discharges (and other specified discharges not relevant here) from the permits "required under ORS 468B.025 or 468B.050[.]" [9] Read together, the statutes prohibit any person from discharging wastes into the waters of the state if those discharges would reduce the quality of that water below the state's water quality standards *unless* the person has a permit from DEQ specifically authorizing the discharge at issue. Neither statute requires that permits **[**564]** issued must contain provisions mandating compliance with **[***13]** water quality standards. [10] Instead of placing that type of limitation on respondent's ability to determine and impose **[*141]** appropriate permit conditions, the statutes generally give respondent discretion in those areas. Indeed, the only express requirement included in ORS 468B.050 as to the issuance of permits thereunder is that such permits "shall specify applicable effluent limitations."

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9 Specifically, HN10 pursuant to ORS 468B.053(2), EQC may exempt "from permit requirements subsurface injection of fluids that are authorized under the underground injection control program of" DEQ. Also, ORS 468B.050 references ORS 468B.215, pursuant to which, "[e]xcept for an animal feeding operation subject to regulation under 33 USC 1342, a fee shall not be assessed to nor permit required under ORS 468B.050(1)(d) of confined animal feeding operations of four months or less duration or that do not have waste water control facilities."

10 HN11 Federal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards. 33 USC **§ 1311(**b)(1)(C); *see Defenders of Wildlife,* 191 F3d at 1163. However, under 33 USC section **1342(p)(3)(B)**, dischargers of **municipal storm [***14] water** are not subject to that requirement. *See Defenders of Wildlife,* 191 F3d at 1165-66. Instead, federal law requires that NPDES permits relating to **municipal storm water** discharges require reduction of "the discharge of **pollutants** to the **maximum** extent **practicable**." 33 USC § **1342(p)(3)(B)**(iii); *see Defenders of Wildlife,* 191 F3d at 1165 ("§ **1342(p)(3)(B)**(iii) creates a lesser standard than **§ 1311**").

Petitioners, citing ORS 468B.030, suggest that an effluent limitation, by definition, must mandate compliance with state water quality standards. That is not the case. ORS 468B.030 provides, in relevant part:

> HN12 "In relation to waters of the state, the [EQC] by rule may establish effluent limitations, as defined in [the **Clean Water Act**], and other minimum requirements for disposal of wastes, minimum requirements for operation and maintenance of disposal systems, and all other matters pertaining to standards of quality for the waters of the state."

HN13 The **Clean Water Act**, in turn, defines "effluent limitation" as "*any* restriction established by a State or the **Administrator** on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from **[***15]** point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 USC § 1362(11) (emphasis added). 11 Thus, although a permit must include restrictions on discharges of **pollutants** into the water, the applicable statute does not specify what form they must take. "Best management practices," such as those incorporated in the permits at issue in this case, are a type of effluent limitation. *See* 40 CFR § 122.44(k)(2) - (3) (best management practices are to be used in NPDES permits where authorized pursuant to 33 USC § 1342(p) for the control of **storm water** discharges or where numeric effluent limits are infeasible); *see also Interim Permitting Approach for Water **Quality-Based** Effluent Limitations in **Storm Water** **[*142]** Permits,* 61 Fed Reg 43,761-01 (Aug 26, 1996) (EPA considers the use of best management practices appropriate in permitting of **municipal storm water** based on typical lack of information on which to base numeric water **quality-based** effluent limitations). In short, petitioners incorrectly equate effluent limitations with state water quality standards. A statutory requirement that **storm water** permits include effluent limitations **[***16]** is not the same as a requirement that the permits mandate compliance with state water quality standards.

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11 Effluent limitations can be water-**quality based**, *see, e.g.,* OAR 340-041-0002(67) (a WLA is a water-**quality-based** effluent limitation) or technology based, *see, e.g.,* 40 CFR § 125.3 (discussing technology-based effluent limitations).

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Petitioners urge that the context of the statute supports their assertion that ORS 468B.025(1)(b) should be read to require the inclusion of specific terms mandating compliance with state water quality standards in any permit issued by respondent. [12] We disagree. In fact, our review of the statutory context confirms our determination that, rather than imposing that specific limitation on respondent's authority to issue the type of permits at issue, the legislature delegated broad discretion to the agency. HN14 ORS 468B.015 sets forth the policies of the state to **[**565]** (1) conserve the waters of the state, (2) protect and improve water quality, (3) provide for treatment or other corrective action before waste is discharged into the water, (4) prevent and control pollution, and (5) cooperate with other agencies, states, and the federal government. [13] In order to **[***17]** carry out that policy, the legislature granted broad authority to respondent:

> "(2) In order to carry out the public policy set forth in ORS 468B.015, [DEQ] shall take such action as is necessary for the prevention of new pollution and the abatement of existing pollution by:
>
> **[*143]** "(a) Fostering and encouraging the cooperation of the people, industry, cities and counties, in order to prevent, control and reduce pollution of waters of the state; and
>
> "(b) Requiring the use of *all available and reasonable methods necessary* to achieve the purposes of ORS 468B.015 and to conform to the standards of water quality and purity established under ORS 468B.048."

ORS 468B.020 (emphasis added); *see also Springfield Education Asso. v. Springfield School Dist.*, 290 Ore. 217, 228, 621 P.2d 547 (1980) (Terms such as "unreasonable" or "public convenience and necessity" are delegative in nature and give an agency "authority, responsibility and discretion for refining and executing generally expressed legislative policy."); ORS 468B.048 (authorizing the agency to "establish standards of quality and purity for waters of this state"); ORS 468.065(1) (providing that all permits shall be "in a form prescribed by" the agency and shall **[***18]** "specify its duration, and the conditions for compliance with the rules and standards, if any, adopted by the [EQC] pursuant to * * * ORS chapters 468 * * * and 468B"). Those statutes, taken together, make clear that, HN15 instead of including many specific requirements regarding the issuance of permits, the legislature intended to delegate the responsibility for appropriately implementing its policies to the agency. That context, in turn, supports our conclusion that the plain text of ORS 468B.025(1)(b) does not require respondent to include in its **storm water** permits specific conditions mandating compliance with state water quality standards. [14] In light of the foregoing, we conclude that respondent's issuance of the permits in this case did not violate ORS 468B.025(1)(b). [15]

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[12] Petitioners also point to our decision in *EQC v. City of Coos Bay*, 171 Ore. App. 106, 14 P3d 649 (2000), in support of their first assignment of error. However, that case does not inform our decision here. There, we considered whether ORS 468B.025 and ORS 468B.050 authorized EQC to impose penalties on a permittee that violated the terms of its permit and concluded that only ORS 468B.025 prohibited violations of **[***19]** permit conditions. We did not address the question whether ORS 468B.025 required particular conditions mandating compliance with water quality standards to be included in NPDES permits issued by DEQ.

[13] ORS 468B.015 was amended in 2009. Or Laws 2009, ch 248, § 1. That amendment does not significantly modify the statute's language and, in any event, is not relevant to this case.

[14] We note that we have considered the legislative history submitted by petitioners but did not find it helpful in resolving the issue presented.

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15 We further note, parenthetically, that petitioners' argument, if extended to ORS 468B.025(1)(a), would lead to an absurd result. That section of the statute prohibits any person from, among other things, causing "pollution of any waters of the state" except as provided by ORS 468B.050 or ORS 468B.053. As noted, ORS 468B.050, in turn, provides for the issuance of permits. Under petitioners' reasoning, however, the issuance of permits that would allow for pollution of waters of the state would be impermissible. As a result, NPDES permits, which allow for pollution by their terms, could never be issued.

Petitioners next assert that the permits are inconsistent with the requirements **[***20]** of OAR 340-045-0015(5)(c). **[*144]** According to petitioners, that rule creates "a distinct and specific regulatory requirement that permits for **municipal** stormwater discharges comply with Water Quality Standards." We are not persuaded.

HN16 "Administrative rules are interpreted under the same analytical framework we apply when construing statutes." *Birmingham v. Department of Forestry,* 209 Ore. App. 736, 743-44, 149 P3d 600 (2006), *rev den,* 342 Ore. 644, 158 P.3d 507 (2007). We defer to an agency's interpretation of its own rule if that interpretation is plausible and not inconsistent with the text of the rule, its context, or some other source of law. *Don't Waste Or. Comm. v. Energy Facility Siting Council,* 320 Ore. 132, 142, 881 P.2d 119 (1994).

HN17 Pursuant to OAR 340-045-0015(5):

> "Each person required by sections (1) and (2) of this rule to obtain a permit must:
>
> "(a) Promptly apply to the Department for the permit;
>
> **[**566]** "(b) Fulfill all terms and conditions of the permit issued;
>
> "(c) Comply with applicable federal and state requirements, effluent standards, and limitations including but not limited to those contained in or promulgated pursuant to Sections 204, 301, 302, 304, 306, 307, 402, and 403 of the [**Clean Water Act**] and **[***21]** applicable federal and state water quality standards[.]"

The permittees in this case are required to obtain permits pursuant to OAR 340-045-0015(2), which provides:

> HN18 "Without first obtaining an NPDES permit, a person may not discharge into navigable waters **pollutants** from a point source or **storm water** subject to permit requirements in 40 CFR § 122.26 or § 122.33, including **storm water** from large, medium, and regulated small **municipal** separate **storm sewer** systems and **storm water** associated with **industrial** or construction activity."

HN19 Like ORS 468B.025, the text of OAR 340-045-0015(5), does not, by its terms, regulate the issuance of permits by the agency. Instead, it requires persons who must obtain permits pursuant to sections (1) and (2) of the rule to do certain things. Namely, those persons must apply for the **[*145]** required permit promptly, fulfill the terms and conditions of the permit, and comply with applicable federal and state requirements and standards. On its face, the rule says nothing about what must be included in a permit, nor does it impose particular conditions on the issuance of permits. In contrast, other rules do impose requirements on respondent with respect to the issuance **[***22]** of permits. *See, e.g.,* OAR 340-045-0027 (public notice and participation requirements for permitting actions); OAR 340-045-0033 (requirements for general permits). Indeed, OAR 340-045-0035, which governs the issuance of the type of permit at issue in this case, imposes specific requirements on respondent.

Furthermore, HN20 OAR 340-045-0015(5) does not itself make state water quality standards applicable to **storm water** dischargers. Instead, it simply requires compliance with "applicable"

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federal and state water quality standards. The text of the provision, thus, only requires that permittees comply with legal standards that some other source makes applicable to them. As we have observed, pursuant to federal and state statutes, permits for the discharge of **municipal storm water,** unlike other NPDES permits, need not incorporate provisions requiring compliance with state water quality standards. In the context of **storm water,** permittees must implement best management practices to reduce the discharge of **pollutants** in **storm water** to the **maximum** extent **practicable**. OAR 340-045-0015(5) does not impose a stricter requirement. Instead, it simply requires that, to the extent that state water quality **[***23]** standards otherwise apply, a permittee must comply with them. Because those standards are not otherwise strictly applicable to **storm water,** the rule does not, itself, make them applicable. In sum, we are not persuaded by petitioners' assertion that, because they do not contain specific conditions requiring compliance with in-stream state water quality standards, the permits violate the requirements of OAR 340-045-0015(5).

In their second assignment of error, petitioners argue that respondent acted inconsistently with ORS 468B.050 and OAR 340-042-0080 when it issued the permits "because the [p]ermits do not incorporate wasteload allocations as enforceable effluent limitations." Petitioners' argument suggests that wasteload allocations should be set forth **[*146]** as numeric limits within the permits and that the benchmarks incorporated into the permits are impermissible.

In their argument regarding the statute, petitioners suggest that the permits are inconsistent with the requirements of ORS 468B.050 and point to that statute's general requirement that permits "shall specify applicable effluent limitations." As discussed above,*HN21* that statute does not mandate that such effluent limitations take **[***24]** a particular form. A best management practices requirement is a type of effluent limitation. In this case, the permits included such a limitation (set forth in detail in the incorporated **storm water** management plans). We reject petitioners' assertion that the permits violate ORS 468B.050.

[567]** We turn to petitioners' assertion that the permits violate OAR 340-042-0080. *HN22* That rule is part of a set of rules adopted by respondent relating to "total **maximum** daily loads (TMDLs)." A TMDL is

> "a written quantitative plan and analysis for attaining and maintaining water quality standards and includes the elements described in OAR 340-042-0040. These elements include a calculation of the **maximum** amount of a **pollutant** that a waterbody can receive and still meet state water quality standards, allocations of portions of that amount to the **pollutant** sources or sectors, and a Water Quality Management Plan to achieve water quality standards."

OAR 340-042-0030(15). TMDLs are established for **pollutants** in waters of the state that are identified, pursuant to 33 USC section 1313(d), as being water quality impaired. OAR 340-042-0040(1); *see* 33 USC § 1313(d). Among other things TMDLs must include loading capacities **[***25]** (the amount of a **pollutant** that a waterbody can receive and still meet water quality standards), wasteload allocations (the portions of the receiving water's loading capacity allocated to particular point sources), and a water quality management plan (a framework of management strategies to attain and maintain water quality standards, including proposed strategies to meet wasteload allocations in the TMDL). OAR 340-042-0040(4).

HN23 As part of the implementation of TMDLs, "[f]or sources subject to permit requirements in ORS 468B.050, **[*147]** wasteload allocations and other management strategies will be incorporated into permit requirements." OAR 340-042-0080(4). In relation to TMDLs, the term "wasteload allocation" is defined, by rule, to mean "the portion of [the] receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. [Wasteload allocations] constitute a type of water **quality-based** effluent limitation." OAR 340-041-0002(67). However, the rule does not specifically provide the manner in which those wasteload allocations must be implemented. Petitioners' argument raises the question whether wasteload

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allocations have been incorporated into **[***26]** the permits in a meaningful way. We conclude that they have.

The applicable TMDLs in this case set forth specific wasteload allocations for **municipal storm water.** The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for **pollutant** parameters associated with the permittee's [**municipal** separate **storm sewer** system] discharges, the permittee must use the estimated **pollutant** load reductions (benchmarks) established in the [**storm water** management plan] to guide the adaptive management process." Furthermore, they include a section that specifically addresses the TMDL wasteload allocations. The section is intended to "ensure **pollutant** discharges for those parameters listed in the TMDL are reduced to the [**maximum** extent **practicable**]. Adequate progress toward achieving assigned wasteload allocations * * * will be demonstrated through the implementation of best management practices that are targeted at TMDL-related **pollutants**." Pursuant to that section, **[***27]** permittees must evaluate progress toward reducing **pollutant** loads "through the use of performance measures and **pollutant** load reduction benchmarks developed and listed in the [**storm water** management plan]." [16] The **storm water** management **[*148]** plan describes a program, including best management practices, designed to achieve reductions in TMDL **pollutants**. Failure to meet an approved benchmark is not, itself, a violation of permit conditions. However, such a failure gives rise to an obligation on the part of the permittee to follow the adaptive management **[**568]** process to improve the **storm water** management plan. Failure to engage in that process would be a violation of the permits.

FOOTNOTES

16 A benchmark is defined in the permit as

> "a total **pollutant** load reduction estimate for each parameter or surrogate, where applicable, for which a [wasteload allocation] is established at the time of permit issuance. A benchmark is used to measure the overall effectiveness of the **storm water** management plan in making progress toward the wasteload allocation * * * and is intended to be a tool for guiding the adaptive management activities."

In our view, the provisions of the permits are sufficient to meet the requirement **[***28]** of OAR 340-042-0080(4) that wasteload allocations be incorporated into permit requirements. The agency has interpreted what it means to "incorporate" wasteload allocations through its implementation of that rule in the issuance of permits, and that interpretation is a reasonable one. Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the **storm water** management plans, to make progress toward meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in **municipal storm water** permits. *See* 40 CFR § 122.44(k)(2) - (3). Furthermore, the permits incorporate benchmarks, through incorporation of the **storm water** management plan, which are specific **pollutant** load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

As well, contrary to petitioners' assertion, the permits incorporate wasteload allocations in a way that is enforceable. Although the **[***29]** failure to reduce **pollutants** to the extent set forth in a particular benchmark is not itself a violation of the permit, it gives rise to specific obligations on the part of the permittee. Furthermore, the requirement that permittees implement best management practices that are set out in their approved **storm water** management plan is an enforceable requirement. Looking at the permits in light of **[*149]** the requirements of the

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regulatory scheme, we conclude that their provisions are sufficient to meet the requirement of OAR 340-042-0080 that "wasteload allocations * * * be incorporated into permit requirements."

In light of the foregoing discussion, we conclude that the permits do not violate ORS 468B.025, ORS 468B.050, OAR 340-045-0015, or OAR 340-042-0080. Accordingly, the trial court did not err in granting summary judgment in favor of respondent.

Return to top
Source: **Legal > / . . . / > Federal & State Environmental Cases**
More Like: HN19 - **Unlike industrial storm water discharges, the Clean Water Act does not require water quality-based standards for municipal storm water discharges. Instead, Congress required municipal storm-sewer discharges to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the administrator or the state determines appropriate for the control of such pollutants. 33 U.S.C.S. § 1342(p)(3)(B)(iii). That requirement does not incorporate the water quality-based requirements of 33 U.S.C.S. § 1311. Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C.S. § 1311, but not to include the same requirement for municipal discharges, must be given effect. 33 U.S.C.S. § 1342(p)(3)(B)(ii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C.S. § 1311(b)(c).** Miss. River Revival, Inc. v. City of St. Paul, 2002 U.S. Dist. LEXIS 25384 (D. Minn. December 2, 2002, Decided)
View: Full
Date/Time: Tuesday, June 28, 2011 - 11:40 PM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available
* Click on any *Shepard's* signal to *Shepardize*® that case.

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EXHIBIT M

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FCD-Gen'l;
Inc. Cities:
BB Lk, Chno, ChHls,
Cltn, Fon, GT, Hlnd,
LL, Mont, Ont, R Cuca,
Rlnds, Rito, SB, Upld, Yucai;
Water-Reg Wtr Qlty Ctrl Bd;
Agree. 92-315

MINUTES OF THE BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, CALIFORNIA

May 4, 1992

FROM: KEN A. MILLER, Director
Transportation/Flood Control

SUBJECT: **NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) STORMWATER PERMIT IMPLEMENTATION AGREEMENT, SANTA ANA REGION - FILE# 6(COM)14.01-03**

RECOMMENDATION: Acting as the governing body of the Flood Control District and as the governing body of the County, approve the Implementation Agreement between the Flood Control District and the Co-Permittees listed in this agreement.

BACKGROUND: On October 19, 1990, the Flood Control District, the County (unincorporated areas), and the incorporated Cities in the County within the Santa Ana River watershed, as Co-Permittees, obtained an area-wide National Pollutant Discharge Elimination System (NPDES) Permit, Order No.90-136, NPDES No. CA8000200, as required by the Clean Water Act, amended in 1987. Under the requirements of the permit, the Co-Permittees are to enter into an Implementation Agreement for delegation of responsibilities and funding of program costs on a shared cost basis. This Agreement provides for the mechanism of funding the program costs by the Co-Permittees and the delegation of responsibilities to fulfill the requirements of the Permit.

REASON FOR RECOMMENDATION: Board approval is required to effect this Agreement.

REVIEW BY OTHERS: This item was reviewed by Deputy County Counsel Charles S. Scolastico on April 17, 1992, by Second, Third, and Fourth District Supervisorial staff on April 24, 1992, and by Fifth District Supervisorial staff on April 10, 1992.

FINANCIAL DATA: The Flood Control District and the County will incur costs of $40,000 and $209,100 respectively for Fiscal Year 1992/1993 as their share of the area-wide program costs. Funding is available from the Flood Control District budget to provide for these cost shares.

PRESENTER: KEN A. MILLER

Agreement No. 92-315

cc: Flood Control-Naresh Varma w/agreement
City w/agree. c/o FCD (16)
CAO
Auditor w/agreement
PWG
Purchasing-Cont. Compliance
EHS-Bennett
File w/agreement

lw

Action of the Board of Supervisors

APPROVED BOARD OF SUPERVISORS
COUNTY OF SAN BERNARDINO

MOTION AYE AYE SECOND AYE MOTION 5

EARLENE SPROAT, CLERK OF THE BOARD

BY

DATED: MAY 4 1992

ITEM 44

14-9507-000
Rev. 10/81

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NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORMWATER PERMIT IMPLEMENTATION AGREEMENT SANTA ANA REGION

This AGREEMENT entered into as of this 4th day of May, 1992 by the County of San Bernardino, (herein called the COUNTY), the San Bernardino County Flood Control District (herein called the DISTRICT), and the Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Ranch Cucamonga, Redlands, Rialto, San Bernardino, Upland, and Yucaipa (herein called the CITIES) establishes the responsibilities of each party with respect to compliance with National Pollutant Discharge Elimination System (NPDES) Stormwater regulations administered by the California Regional Water Quality Control Board (RWQCB, SAR) by the authority granted by the Clean Water Act (CWA) and its 1987 amendments and the Water Quality Act (WQA).

RECITALS

Whereas

Congress in 1987 amended Section 402 of the Federal Clean Water Act (33 U.S.C.A. 1342 (p)) to require the federal Environmental Protection Agency to promulgate regulations for applications for permits for stormwater discharges; and

Whereas

These permit regulations will require the control of pollutants from stormwater discharges by requiring a National Pollutant Discharge Elimination System (NPDES) Permit for the discharge of stormwaters into water of the United States; and

Whereas

These EPA regulations will require NPDES permits for discharges from municipal storm sewers on a system-wide or jurisdiction-wide basis; and

Whereas

The State Legislature, in enacting the San Bernardino County Flood Control Act, created the San Bernardino County Flood Control District to provide for the control of flood and storm waters; and

Whereas

The Powers granted to the DISTRICT include carrying on technical and other investigations, examinations, or tests of all kinds, making measurements, collecting data, and making analyses, studies, and inspections pertaining to water supply, control of floods, use of water, water quality, nuisance, pollution, waste, and contamination of water both within and without the DISTRICT; and

Whereas

The CITIES, the COUNTY and the DISTRICT desire to develop an integrated stormwater discharge management program with the objective of improving water quality in the County of San Bernardino; and

Whereas

The California State Water Resources Control Board (CSWRCB) as designee of the EPA has delegated authority to the Regional Water Quality Control Board - Santa Ana Region

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(RWQCB, SAR) for administration of the NPDES Storm Water permit application process within the boundaries of their Regions; and

Whereas
The RWQCB, SAR issued NPDES Permit Number 8000200 on October 19, 1990 for the regulation of stormwaters; and

Whereas
The DISTRICT, COUNTY, and CITIES have been designated as co-permittees by the RWQCB, SAR; and

Whereas
The DISTRICT has been designated as the Principle Permittee in the NPDES Permit; and

Whereas
The COUNTY and the CITIES have been designated as the Co-Permittees in the NPDES Permit; and

Whereas
Cooperation between the CITIES, the COUNTY, and the DISTRICT to jointly file applications for NPDES Storm Water Permits is in the best interest of the CITIES, the COUNTY, and the DISTRICT; and

NOW THEREFORE, the parties hereto do mutually agree as follows:

I. Filing Status. The COUNTY, DISTRICT, and CITIES will file the applications for storm water permits as co-permittees. The COUNTY, the DISTRICT, and each individual CITY will be a co-permittee.

II. Incorporation of Federal Regulations. The terms of all applicable Federal and State guidelines, as presently written or as changed during the life of this AGREEMENT are hereby incorporated by reference and made a part of this AGREEMENT and take precedence over any inconsistent terms of this AGREEMENT.

III. Delegation of Responsibilities. The responsibilities of each of the parties shall be as follows:

A. The DISTRICT, on a cost-shared basis, shall administer system compliance by:

1. Preparing and implementing an annual operating budget with the participation of the co-permittees. The budget year shall coincide with the fiscal year of the DISTRICT, July 1 - June 30.

a. The co-permittees shall be permitted to review and approve the annual operating budget for the forthcoming year. Criteria for approval shall be an affirmative response from a majority of the co-permittees. The review period shall be from November 1 to November 30 of each year with approval of the final budget to be completed by December 15.

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2. Preparing compliance reports to the Regional Board and providing copies to the co-permittees.

3. Preparing a draft system-wide Best Management Practices (BMP) Program report for review and approval by the co-permittees.

4. Monitoring the implementation and ensuring the effectiveness of system-wide BMPs. This will include field reconnaissance to evaluate structural and procedural BMPs.

5. Preparing an annual report to the RWQCB, SAR presenting the results of these evaluations.

B. The DISTRICT shall, to the maximum extent practicable and on a cost-shared basis except in paragraph 3 below:

1. Perform the water quality and hydrographic monitoring for permit compliance.

2. Develop uniform criteria for annual inspection of drainage facilities.

3. Perform inspections, at no cost to the CITIES or the COUNTY, on those facilities owned by the DISTRICT. Contract, for such inspections within the CITIES or COUNTY may be undertaken at the sole expense of the requesting CITY or COUNTY.

C. The CITIES shall, to the maximum extent practicable and at no cost to COUNTY or DISTRICT:

1. Implement a facility inspection program in accordance with the uniform criteria developed by the DISTRICT, for all municipal separate storm sewers as defined by the NPDES permit and within the jurisdictional boundaries of that CITY.

2. Submit to the DISTRICT on an annual basis, storm drain maps which reflect the modifications that were made to the storm drain system during the past year.

3. Prepare watershed characterizations, including:

a. Zoning designations.

b. Identification of areas where hazardous materials presently are or are suspected to have been stored, manufactured, or disposed of. This shall include sites at which a hazardous material spill has occurred.

4. Review, approve, and implement system-side BMPs.

5. Eliminate or have eliminated, illegal/illicit connections to the storm drain system.

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6. Identify the legal authority for control of discharges to the storm drain system.

7. Provide to the DISTRICT annual reports (on forms prepared by the DISTRICT) and any other information, in a timely fashion, needed to satisfy annual reporting requirements of the RWQCB, SAR.

8. Adopt and enforce a water pollution control ordinance, which prohibits non-NPDES permitted discharges to the municipal separate storm sewer system.

D. The COUNTY shall, to the maximum extent practicable and at no cost to the CITIES or the DISTRICT, undertake in the unincorporated areas of the COUNTY, all activities required above of the CITIES that are not responsibilities of the DISTRICT as outlined in Section III.B.

IV. Program Costs. The responsibilities for payment of all shared costs of equipment, services, contracted analytical services, and the cost of the NPDES Permit, shall be distributed among the DISTRICT, COUNTY, and CITIES as follows:

Participant	Percent Contribution
DISTRICT	5
CITIES + COUNTY	95

Using the COUNTY's Geographical Information System, the DISTRICT will determine the adjusted acreage for each CITY and the COUNTY from the land use, area, and run-off coefficients as contained in Appendix A on an annual basis. National forests, state parks, airports, landfills, and military installations are excluded.

These calculations shall be completed by November 1 of each year and shall be included in the annual budget proposal.

The total of shared costs shall not exceed $800,000 for fiscal year 1992/1993. A deposit which constitutes a share percentage according to Appendix A of the total anticipated first year costs shall be required of each CITY and the COUNTY. The DISTRICT shall invoice each co-permittee on a quarterly basis with the first payment due within 45 days of the date of the invoice.

If at any time during a subsequent fiscal year the program costs exceed the sum of the deposits, the DISTRICT shall submit invoices to the CITIES and the COUNTY to recover the deficit. The share for each CITY and the COUNTY shall be prorated according to the formula above. Each CITY and the COUNTY shall pay the invoice within 45 days of the billing date.

The DISTRICT shall prepare a fiscal year end accounting within 60 days of the end of each fiscal year and distribute copies to the co-permittees for their review. Co-permittees shall have forty-five calendar days from the date of their receipt of the fiscal year end accounting to dispute in writing or concur with the findings. If the fiscal year end accounting results in costs exceeding the sum of the deposits (including interest earnings), the DISTRICT shall invoice each CITY and the COUNTY for its prorated

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share of the excess cost. Each CITY and the COUNTY shall pay the billing within 45 days of the date of the invoice. If the fiscal year end accounting results in the sum of the deposits (including interest earnings) exceeding costs, the excess deposits will carry forward to reduce the billings for the following year.

After the initial billing for the program, the DISTRICT shall invoice each CITY and the COUNTY for its annual deposit after July 1, the start of the fiscal year. Each CITY and the COUNTY shall pay the deposit within 45 days of the date of the invoice. Each CITY's and the COUNTY's deposit shall be based on their prorated share of the approved annual budget, reduced for any surplus identified in the prior fiscal year-end accounting.

Interest earned on the CITIES' and the COUNTY's deposits will not be paid to the CITIES and the COUNTY, but will be credited against the CITIES' and the COUNTY's share of the program costs.

Upon termination of the program, a final accounting shall be performed by the DISTRICT If costs exceed the sum of the deposits (including interest earnings), the DISTRICT shall invoice each CITY and the COUNTY for its prorated share of the excess. Each CITY and the COUNTY shall pay the invoice within 45 days of the date of the invoice. If the sum of the deposits (including interest earnings) exceed the costs, the DISTRICT shall reimburse to each CITY and the COUNTY its prorated share of the excess, within 45 days of the final accounting. Interest earnings are used to offset the CITIES' and the COUNTY's share of program costs and will not be refunded to the CITIES and the COUNTY.

Each CITY and the COUNTY shall bear the financial responsibility for implementing the program, within its jurisdictional boundaries, as outlined in Section III.C. and D.

The annual fee for the NPDES permit and the annual administrative costs incurred by the DISTRICT shall be included in the total cost and paid according to Section IV and Appendix A.

The financial responsibility for this agreement will be effective beginning with the 1992/1993 fiscal year.

V. Life of the AGREEMENT. The life of the AGREEMENT shall be for an indefinite period and such indefinite period shall end at such time as the Clean Water Act and/or the RWQCB, SAR ceases to mandate compliance.

VI. Additional Parties. Any city or other entity which wishes to be a co-permittee on the San Bernardino County Stormwater NPDES Permit that was issued by RWQCB, SAR shall agree to the provisions in this funding agreement and shall sign this AGREEMENT prior to be included in the permit. The date of initiation, for determining participant costs for any new co-permittee shall be the date of inclusion in the San Bernardino County Stormwater NPDES Permit issued by RWQCB, SAR. The cost for adding any additional co-permittee to the program, including additional permit and processing fees, shall be paid by the added co-permittee. Monies, if any, to be reimbursed to the existing co-permittees shall be credited to their respective annual program operating fees for the following budget year.

VII. Withdrawal from the AGREEMENT. A co-permittee may withdraw from this

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AGREEMENT at the end of any fiscal year with written notice being received by the DISTRICT 90 days prior to the end of the fiscal year. The withdrawing co-permittee shall agree to file for a separate NPDES permit and to comply with all of the requirements established by the RWQCB, SAR. The withdrawing co-permittee shall be responsible for all lawfully assessed penalties as a consequence of withdrawal. The cost allocations to the remaining members will be calculated in the following budget year.

VIII. Non-compliance with NPDES Permit Requirements. Any co-permittee found in non-compliance with the conditions of the NPDES permit within their jurisdictional responsibilities shall be solely liable for any lawfully assessed penalties, pursuant to Section 13385 of the Water Code. Penalties that apply to all the permittees shall be assessed according to the formula in Appendix A.

IX. Legal Action/Costs/Attorney Fees. Where any legal action is necessary to enforce any provision hereof for damages by reason of an alleged breach of any provisions of this AGREEMENT, the prevailing party shall be entitled to receive from the losing party all attorney's fees and costs incurred in conjunction with such legal action.

X. Amendments to the AGREEMENT. This AGREEMENT may be amended by consent of a two-thirds majority of the co-permittees (rounded to the nearest whole number). Amendments to this AGREEMENT may be adopted and executed concurrently, and shall become effective upon its execution by a majority of the co-permittees as defined above.

XI. Authorized Signatories. Each permittee and co-permittee will determine by either resolution or ordinance who will be the authorized signatory. This person shall be authorized to execute the application(s) for NPDES Stormwater permit(s) and take all other procedural steps necessary to file the application(s) for NPDES Stormwater permit(s).

XII. Notices. All notices shall be deemed duly given if delivered by hand; or five (5) working days after deposit in the U.S. Mail, certified mail, return receipt requested.

XIII. Governing Law. This AGREEMENT will be governed and construed in accordance with laws of the State of California. If any provision or provisions of this AGREEMENT shall be held to be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired hereby.

XIV. Consent to Breach not Waiver. No term or provision hereof shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by any permittee to have waived or consented. Any consent by any permittee to, or waiver of, a breach by the other, whether expressed or implied, shall not constitute a consent to, waiver of, or excuse for any other different or subsequent breach.

XV. Applicability of Prior Agreements. This document constitutes the entire AGREEMENT between the co-permittees with respect to the subject matter; all prior agreements, representation, statements, negotiations, and undertakings are superseded hereby.

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XVI. Execution of the AGREEMENT. This AGREEMENT may be executed in counterpart and the signed counterparts shall constitute a single instrument.

IN WITNESS WHEREOF, the AGREEMENT has been executed as of the day and year first above written.

PLEASE INSERT YOUR AGENCY'S STANDARD SIGNATURE PAGE.

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COUNTY OF SAN BERNARDINO

Larry Walker
Chairman, Board of Supervisors

(State if corporation, company, etc.)

Dated MAY 0 4 1992 By

(Authorized Signature)

91-315

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

Dated

Clerk of the Board of Supervisors of the County of San Bernardino

Title

Address

Deputy

BOARD OF SUPERVISORS
OFFICIAL SEAL
SAN BERNARDINO COUNTY, CA

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT

Larry Walker
Chairman, Board of Supervisors

(State if corporation, company, etc.)

Dated MAY 0 4 1992 By

(Authorized Signature)

ATTESTED:

Dated

Earlene A. Bledsoe

Title

Secretary of the Flood Control District

Address

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

EARLENE BLEDSOE
Clerk of the Board of Supervisors
of the County of San Bernardino

By

Deputy

BOARD OF SUPERVISORS
SAN BERNARDINO COUNTY, CA

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CITY OF BIG BEAR LAKE

APPROVED AS TO FORM:

Scott C. Smith
Best, Best & Krieger
City Attorney

By:
Stephen L. Wright
City Manager

Date: May 6, 1992

ATTEST:

Shirley A. Dege
City Clerk

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IN WITNESS, WHEREOF, the AGREEMENT has been executed as of the day and year first above written.

BY: _____
CITY MANAGER OF THE CITY OF CHINO

ATTEST

_____ 5/5/12
CITY CLERK OF THE CITY OF CHINO

APPROVED AS TO LEGAL FORM:

_____
CITY ATTORNEY

APPROVED AS TO CONTENT:

_____
CITY ENGINEER

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IN WITNESS WHEREOF, the AGREEMENT has been executed as of the day and year first above written.

CITY OF CHINO HILLS

Gwenn Norton-Perry, Mayor

ATTEST:

City Clerk

Approved as to form:

City Attorney

E02\AGREE:NPDES.CAV

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IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT as of the dates set out.

Executed this 5th day of May, 1992.

By: _____
MARK LEWIS
City Manager
City of Colton

Attest: _____
HELEN A. RAMOS, CMC
City Clerk
City of Colton

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IN WITNESS WHEREOF, the AGREEMENT has been executed as of the day and year first above written.

CITY OF FONTANA
A Municipal Corporation

READ AND APPROVED:

Clark Alsop or
Stephen P. Deitsch
City Attorney

This document is the true and complete document approved by City Council on May 5, 1992.

Linda S. Nunn, CMC
Deputy City Clerk

CITY OF FONTANA
A MUNICIPAL CORPORATION

REVIEWED:

Greg Hulsizer
Community Development Director

Jennifer Vaughn Blakely
Compliance Officer

For Michael Sokol
Risk Management

CITY OF FONTANA

Patricia Murray, Mayor Pro Tem

ATTEST:

Kathy Montoya
City Clerk

(ADMIN\SANTANA.AGR)

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IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT as of the dates set out.

Executed this 9th day of April, 1992.

By: Byron Matthews
Mayor
City of Grand Terrace

Attest: Brenda Stanfill
Deputy City Clerk

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IN WITNESS WHEREOF, the undersigned have executed this agreement as of the dates set out.

Executed this 30th day of April, 1992.

By: _____
Dennis Johnson, Mayor
City of Highland

Attest: _____
Debbie Anderson
Deputy City Clerk

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Approved the 25th day of February 1992.

Dated: May 4, 1992

CITY OF LOMA LINDA

Robert H. Christman, Mayor

ATTEST:

Pamela Byrnes-O'Camb, City Clerk

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SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT

By: _____

Date: _____

RECOMMENDED FOR APPROVAL:

_____
DIRECTOR OF PUBLIC WORKS

Date: 4/20/92

CITY OF MONTCLAIR
A Municipal Corporation

By: _____
MAYOR

Date: 4/21/92

ATTEST:

_____
CITY CLERK

Date: 4/22/92

APPROVED AS TO FORM:

_____
DEPUTY **CITY ATTORNEY**

Date: 4/23/92

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IN WITNESS WHEREOF, the AGREEMENT has been executed as of the day and year first above written. Executed this 5th day of May 1992.

CITY OF ONTARIO

By: _____
Mayor

ATTEST: _____
City Clerk

CITY OF ONTARIO INCORPORATED DECEMBER 1891 CALIFORNIA

APPROVED AS TO FORM:

THIS 4th **DAY OF** May 1992

_____
CITY ATTORNEY

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ACCEPTED: May. 6, 1992

CITY OF RANCHO CUCAMONGA, A MUNICIPAL CORPORATION

By: Dennis L Stout, Mayor
5-7-92

Attest: Debra J. Adams
City Clerk

Approved: James L. Markman
City Attorney

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IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT.

CITY OF REDLANDS

By: _____
Mayor

ATTEST:

_____
City Clerk

May 5, 1992
Date

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IN WITNESS WHEREOF, the AGREEMENT has been executed as of the day and year first above written.

JOHN LONGVILLE, MAYOR
CITY OF RIALTO

ATTEST:

JOSEPH H. SAMPSON, CITY CLERK

APPROVED AS TO FORM AND CONTENT:

ROBERT A. OWEN, CITY ATTORNEY

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IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT as of the dates set out.

CITY OF SAN BERNARDINO

By _____
W. R. HOLCOMB, Mayor

ATTEST:

Rachel Krasney
RACHEL KRASNEY, City Clerk
by Sandra Medina, Deputy

Approved as to form
and legal content:

James F. Penman
City Attorney

By James F. Penman

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IN WITNESS WHEREOF, the undersigned have executed this National Pollutant Discharge Elimination System Stormwater Permit Implementation Agreement Santa Ana Region as of the dates set out.

Executed this 27th day of April, 1992.

By: Robert R. Nolan
Robert R. Nolan, Mayor
CITY OF UPLAND

ATTEST:

Sheryll Schroeder
Sheryll Schroeder, City Clerk

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IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT as of the date set out.

Executed this 27th day of May 1992.

LILLIAN C. EATON, MAYOR
CITY OF YUCAIPA

ATTEST:

JUANITA BROWN, CITY CLERK

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APPENDIX A

The following formula will be used by the District to determine the share costs as required in the "National Pollutant Discharge Elimination System Stormwater Permit Implementation Agreement, Santa Ana Region", Section IV.

1. Total Program Costs will be determined by the DISTRICT and allocated to the CITIES and the COUNTY by the following formula:

$$\frac{\text{Agency AA}^*}{\text{AA}^{**}} \times (\text{annual cost} \times 0.95) = \text{Agency's Contribution Total}$$

AA - Adjusted Acreage
* - Each agency as listed below
** - Total adjusted acreage

AGENCY:

County of San Bernardino

Cities of:

Big Bear Lake	Chino
Chino Hills	Colton
Fontana	Grand Terrace
Highland	Loma Linda
Montclair	Ontario
Rancho Cucamonga	Redlands
Rialto	San Bernardino
Upland	Yucaipa

2. The Agency Adjusted Acreage will be determined by the DISTRICT using the following formula:

$$[(I_{lu\ 1} - U_{lu\ 1}) \times C_{lu\ 1}] + [(I_{lu\ 2} - U_{lu\ 2}) \times C_{lu\ 2}] + \ldots + [(U_{1-13}) \times C] = \text{Adjusted Acreage}$$

I – Improved acreage for each landuse as defined below
U – Unimproved acreage for each landuse as defined below
lu – landuse as defined in the following table
C – Runoff coefficient as derived from the San Bernardino County Hydrology Manual

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Appendix A
(continued)

Landuse	Formula Designation	Runoff Coefficient (C)
Single Family Residential		
2.5 acre lots	lu 1	0.594
1 acre lots	lu 2	0.594
2 dwellings/acre	lu 3	0.695
3-4 dwellings/acre	lu 4	0.695
5-7 dwellings/acre	lu 5	0.695
8-10 dwellings/acre	lu 6	0.766
>10 dwellings/acre	lu 7	0.766
Multiple Family Residential		
Condominiums	lu 8	0.766
Apartments	lu 9	0.766
Mobile Home Parks	lu 10	0.775
Commercial, Downtown Business or Industrial	lu 11	0.820
School	lu 12	0.699
Public Park & Agircultural	lu 13	0.594
Undeveloped	U 1-13	0.547

Reference: San Bernardino County Hydrology Manual and SCAG modified Anderson landuse classification (1992)

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MINUTES OF THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY, CALIFORNIA

FCD, Gen'l.
Inc. Cities/Listed
on back
Agree. No. 92-315

December 12, 1995

FROM: KEN A. MILLER, Director
Transportation/Flood Control

SUBJECT: NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) STORMWATER PERMIT IMPLEMENTATION AGREEMENT, SANTA ANA REGION - FILE#10(NPD)-2.11

RECOMMENDATION: Acting as the governing body of the Flood Control District and as the governing body of the County, approve Amendment No. 1 to Implementation Agreement No. 92-315 between the Flood Control District and the Co-Permittees listed in this agreement.

BACKGROUND INFORMATION: On October 19, 1990, the Flood Control District and the County (unincorporated areas), and the incorporated Cities in the County within the Santa Ana River watershed, as Co-Permittees, obtained an area-wide National Pollutant Discharge Elimination System (NPDES) Permit, Order No.90-136, NPDES No. CA8000200, as required by the Clean Water Act, Amended in 1987. Under the requirements of the permit, the Co-Permittees entered into an Implementation Agreement for delegation of responsibilities and funding of program costs on a shared cost basis. This Amendment No. 1 to the Agreement revises the mechanism of funding the program costs by the Co-Permittees. The District's share of funding will remain at 5% of the program cost while the County's will reduce from 26% to 12.3%.

REASON FOR RECOMMENDATION: Board approval is required to effect this Amendment.

REVIEW BY OTHERS: This item was reviewed by Deputy County Counsel Charles S. Scolastico on September 25, 1995, by Fourth and Fifth District Supervisorial Staffs on October 3, 1995, by Second District Supervisorial Staff on October 5, 1995, and by Third District Supervisorial Staff on October 12, 1995.

FINANCIAL DATA: The Flood Control District and the County will incur costs of approximately $23,700.00 and $58,500.00 respectively, for Fiscal Year 1995/1996 as their share of the area-wide program costs. Funding is available from the Flood Control District budget to provide for these costs.

PRESENTER: Ken A. Miller

cc: Flood Control Dist. w/5
agr. for signature
Cities (16) c/o FCD
Auditor
Contract Compliance
Risk Management
PWG
File w/agr.

vg

Action of the Board of Supervisors

AGREEMENT NO. 92-315 A-1

APPROVED BOARD OF SUPERVISORS
COUNTY OF SAN BERNARDINO

MOTION	AYE	SECOND	ABSENT	AYE	MOVE
	1	2	3	4	5

EARLENE SPROAT, CLERK OF THE BOARD

BY _____ Deputy

DATED: December 12, 1995

ITEM 43

14-9507-000
Rev. 10/81

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SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT

F A S

CONTRACT TRANSMITTAL

FOR COUNTY USE ONLY

E / M / X	New / Change / Cancel	Vendor Code	D. SC 097	A	Contract Number 92-315 A-1
County Department: Transportation/Flood Control Department		Dept. 097	Organ. 097		Contractor's License No.
Flood Control District Contract Representative: Charles L. Laird		Ph. Ext. 2799			Amount of Contract
Fund: RLF	Dept.: 099	Organization: 099	Appr.: 200	Obj/Rev Source: 9145	Activity / GRC/PROJ/JOB Number: 301-01343
Commodity Code		Project Name			

Estimated Payment Total by Fiscal Year

FY	Amount	I/D	FY	Amount	I/D

CONTRACTOR Co-Permittees: County of San Bernardino, Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Rancho Cucamonga, Redlands, Rialto, San Bernardino, Upland, and Yucaipa

Birth Date _____ Federal ID No. or Social Security No. _____

Contractor's Representative _____

Address _____ Phone _____

Nature of Contract: *(Briefly describe the general terms of the contract)*

AMENDMENT NO. 1 TO AGREEMENT NO. 92-315

Amend National Pollutant Discharge Elimination System (NPDES) Stormwater Permit Implementation Agreement No. 92-315 in order to more accurately distribute the area-wide program costs based on redefined run-off coefficients and corresponding land uses.

The AGREEMENT shall remain unchanged, except for the following specific amendments:

1. Delete the second paragraph of Section IV, page 4; the said paragraph beginning on Line 183 and ending on Line 186. This paragraph is replaced by the following:

   "Using the County Assessor's land use parcel data, the DISTRICT will determine the total number of assessable land use units as per the methodology described in Appendix A-1, on an annual basis. Vacant, undeveloped land; agricultural uses including dairies, poultry, livestock, groves, orchards, rain crops, field crops, vines or dry farming; and publicly-owned parcels which are parcels owned by a federal, state or local public entity or agency and used for public purposes are exempted land uses."

2. Appendix A is deleted and replaced by Appendix A-1 as attached hereto.

3. This amendment, and any amendments thereto, may be signed in counterparts.

(Attach this transmittal to all contracts not prepared on the "Standard Contract" form.)

Approved as to Legal Form	Reviewed as to Affirmative Action	Reviewed for Processing
► _____	► _____	► _____
County Counsel		Agency Administrator/CAO
Date 9-26-95	Date 9-27-95	Date _____

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COUNTY OF SAN BERNARDINO

Marsha Turoci

Chairman, Board of Supervisors 92-315 A-1

Dated: DEC 12 1995

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

Clerk of the Board of Supervisors of the County of San Bernardino

Vada Gaiche

Deputy

(State if Corporation, Company, etc.)

By: _____

(Authorized Signature)

Dated: _____

Title: _____

Address: _____

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT

Marsha Turoci

Chairman, Board of Supervisors

Dated: DEC 12 1995

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD.

EARLENE SPROAT
Clerk of the Board of Supervisors
of the County of San Bernardino

By Vada Gaiche

Deputy

(State if Corporation, Company, etc.)

By _____

(Authorized Signature)

Dated: _____

Title: _____

Address: _____

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NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) STORMWATER PERMIT IMPLEMENTATION AGREEMENT NO. 92-315 - AMENDMENT NO. 1

IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT

April 30, 1996
Date

Neal Hertzmann, Mayor
City of Big Bear Lake

ATTEST:

Katherine E. Jefferies
Katherine E. Jefferies
City Clerk

APPROVED AS TO FORM:

Best, Best & Krieger
City Attorneys

Received
June 30, 2011
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CITY OF CHINO

November 30, 1995
DATED

CITY MANAGER, CITY OF CHINO

ATTEST:

11/30/95
CITY CLERK, CITY OF CHINO

APPROVED AS TO CONTENT:

DIRECTOR OF PUBLIC WORKS
CITY ENGINEER, CITY OF CHINO

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CITY OF COLTON

SIGNATURE PAGE
FOR
AMENDMENT NO. 1 TO THE NPDES STORMWATER
IMPLEMENTATION AGREEMENT WITH THE
COUNTY OF SAN BERNARDINO, FLOOD CONTROL

NOVEMBER 7, 1995

George V. Fulp, Mayor

Date: Nov. 7, 1995

ATTEST:

Teresa S. Delgado, Deputy

Helen A. Ramos, CMC
City Clerk

Date: Nov. 7, 1995

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READ AND APPROVED AS TO LEGAL
FORM AND CONTENT:

Clark Alsop or
Stephen P. Deitsch
City Attorney

Ken Jeske
Public Services Director

Arlene Peasnall/Robert Graham
Risk Management

CITY OF FONTANA
A Municipal Corporation

Gregory C. Devereaux
City Manager

ATTEST:

Kathy Montoya
City Clerk

Received
June 30, 2011
Commission on
State Mandates

IN WITNESS WHEREOF, the undersigned have executed this AGREEMENT as of the dates set out.

Executed this 9th day of November, 1995.

By: _____
Byron Matteson, Mayor
City of Grand Terrace

Attest:

_____
Brenda Stanfill
City Clerk

Received
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Commission on
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CITY OF HIGHLAND

Mayor
Dennis Johnson

November 14, 1995
Date

ATTEST:

Debbie Anderson
City Clerk

November 14, 1995
Date

Received
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Approved by the City Council of the City of Loma Linda the 28th day of November 1995.

CITY OF LOMA LINDA

Robert H. Christman, Mayor

ATTEST:

Pamela Byrnes-O'Camb, City Clerk

Received
June 30, 2011
Commission on
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In Witness Whereof, the parties have executed this Amendment on the dates set forth below:

CITY OF MONTCLAIR,

Paul M. Eaton

Paul M. Eaton, Mayor

Date: 11/21/95

ATTEST TO:

Margaret A. Crawford

Margaret A. Crawford, City Clerk

Date: 11/21/95

Received
June 30, 2011
Commission on
State Mandates

IN WITNESS WHEREOF, AMENDMENT NO. 1 TO SAN BERNARDINO COUNTY AGREEMENT NO. 92-315 has been executed as of the day and year first above written. Executed this 11-15-95 day of November 1995.

CITY OF ONTARIO

By: _____
Mayor

ATTEST: _____
City Clerk

APPROVED AS TO FORM
DATE 10-24-95
BY _____
ASST. CITY ATTORNEY
FOR ONTARIO, CALIFORNIA

Received
June 30, 2011
Commission on
State Mandates

ACCEPTED: November 15, 1995

CITY OF RANCHO CUCAMONGA, A MUNICIPAL CORPORATION

By: _____ Mayor

Attest: _____
City Clerk

Approved: _____
City Attorney

Received
June 30, 2011
Commission on
State Mandates

IN WITNESS WHEREOF, the AMENDMENT has been executed on the 7th day of November, 1995.

CITY OF REDLANDS

BY: _____
Mayor

ATTEST:

_____
City Clerk

November 15, 1995
Date

Received
June 30, 2011
Commission on
State Mandates

PASSED, APPROVED AND ADOPTED this 7th day November, 1995.

JOHN LONGVILLE, MAYOR
CITY OF RIALTO

ATTEST:

BARBARA McGEE, CITY CLERK

APPROVED AS TO FORM:

ROBERT A. OWEN, CITY ATTORNEY

STATE OF CALIFORNIA)
COUNTY OF SAN BERNARDINO) ss
CITY OF RIALTO)

I, BARBARA McGEE, City Clerk of the City of Rialto, do hereby certify that the foregoing Amendment No. 1 to Agreement No. 92-315 was duly passed and adopted at a regular meeting of the City Council of the City of Rialto held on the 7th day of November, 1995.

Upon motion of Council Member Sampson, seconded by Council Member Zupanic-Skaggs, the foregoing Amendment No. 1 to Agreement No. 92-315 was duly passed and adopted.

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Commission on
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CITY OF SAN BERNARDINO

CITY OF SAN BERNARDINO,
a municipal corporation

ATTEST:

Rachel Clark
Rachel Clark, City Clerk

Tom Minor
Tom Minor, Mayor

Approved as to form
and legal content:

James F. Penman
City Attorney

By James F. Penman

Received
June 30, 2011
Commission on
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IN WITNESS WHEREOF, the undersigned have executed this AMENDMENT NO. 1 TO AGREEMENT NO. 92-315 - CITY OF YUCAIPA as of the date set out.

Executed this 13th day of November 1995.

WILLIAM L. SEMANS, MAYOR

ATTEST:

NITA BROWN, CITY CLERK

Received
June 30, 2011
Commission on
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APPENDIX A-1

The following formula will be used by the DISTRICT to determine the share costs for the area-wide program as required in the "National Pollutant Discharge Elimination System Stormwater Permit Implementation Agreement, Santa Ana Region", Section IV.

1. The total annual area wide program costs will be determined by the DISTRICT and allocated to the CITIES and the COUNTY by the following formula:

   Agency's annual contributing total = (total Program Costs x 0.95) x Agency's contributing percentage

   Agencies:

   County of San Bernardino
   Cities of:

Big Bear Lake	Chino
Chino Hills	Colton
Fontana	Grand Terrace
Highland	Loma Linda
Montclair	Ontario
Rancho Cucamonga	Redlands
Rialto	San Bernardino
Upland	Yucaipa

2. Agency's contributing percentage is determined by the following:

   1 Basic Unit (BU) = 1/6-acre single-family residential parcel with a runoff factor of 0.40

   Number of Basic Units per Land Use

GROUP	LAND USE	RUNOFF FACTOR	NO. OF BUs PER ACRE
A	Commercial, Industrial, Poultry	0.80	12
B	Apartments/Mobile Home Parks Churches and Schools	0.60	9
C	Single-Family Residential	0.40	*
D	Dairies, Livestock (Exempt)		
E	Irrigated Groves, Golf Courses	0.0067	0.10
F	Cultivated Crops, Undeveloped Land	0.0033	0.05

   $$\text{number of basic units per acre} = \frac{\text{(area of parcel in acres) x (runoff factor)}}{\text{1 Basic Unit}}$$

   Example:
   For 1-acre commercial parcel.

   $$\text{No. of basic units/acre} = \frac{\text{1-ac x 0.8}}{\text{1/6-ac x 0.4}} = 12$$

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*To further define single-family residences (S.F.R.), the following formula were used:

S.F.R.: 0-7,200 S.F. parcels
number of basic units = (1 basic unit) x (number of parcels)

S.F.R.: 7,201 S.F. - 2.5-acre parcels
number of basic units = (1 basic unit) x (number of parcels) + (total acres - number of parcels x 0.17) x 0.1 basic unit/acre

S.F.R.: on greater than 2.5-acre parcels
number of basic units = (1.23 basic units) x (number of parcels) + (total acres - 2.5 acres/parcel x number of parcels) x 0.05 basic units/acre

$$\text{AGENCY'S CONTRIBUTING PERCENTAGE} = \frac{\text{AGENCY'S TOTAL BASIC UNITS}}{\text{TOTAL BASIC UNITS IN PERMIT AREA}}$$