BURHENN & GEST LLP
624 SOUTH GRAND AVENUE
SUITE 2200
LOS ANGELES, CALIFORNIA 90017-3321
(213) 688-7715
FACSIMILE (213) 688-7716

WRITER'S DIRECT NUMBER
(213) 629-8788

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

July 29, 2011

Via CSM Dropbox

Mr. Drew Bohan
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Santa Ana Region Water Permit – San Bernardino County, 10-TC-10 – Corrected Section 5 Narrative Statement

Dear Mr. Bohan:

Attached to this letter please find a Corrected Section Five Narrative Statement to replace the existing Narrative Statement of the above-referenced test claim. The changes in this statement reflect the correction of the following items, all concerning portions of Section XI of the Santa Ana Region Water Permit, the executive order that is the subject of the test claim:

1. Deletion of Section XI.C.1 from test claim;

2. Inclusion of Sections XI.C.3 and XI.C.4 in test claim;

3. Correction of reference to Section XI.D.2 instead of XI.D.1;

4. Deletion of reference to Section XI.G., which was not intended to be included in test claim.

Other miscellaneous minor corrections also were made to the Narrative Statement, which is attached in both clean and "redline" formats to show all changes. Test claimants have also attached a clean and "redline" version of Exhibits 1-3 to Section Five.

If your staff has any questions on the attached documents, they may call me at the number noted above or contact me via e-mail.

Thank you for your consideration of these corrected documents.

Very truly yours,

David W. Burhenn

cc: Claimants

SECTION FIVE

CORRECTED 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)

CORRECTED 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.

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 and coordinate among permittees 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 and in the monitoring and reporting program associated with the 2010 Permit.

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 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.

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 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").

"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.

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, 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~~ other parts of Paragraph VI.C, ~~additional Sections included in the Test Claim~~ set forth below.

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

[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.

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.

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 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.

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

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.

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-

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

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).

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.

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

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

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.

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'

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

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.

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]

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

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.

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.

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.

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.

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.

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.3-C.~~4~~1, D.2~~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

> 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.

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 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 requirement for the principal permittee and other permittees to collaborate to resolve impediments to implement watershed protection principles during the planning and development process, including LID principles and management of hydrologic conditions of concern ("HCOC") (Section XI.C.3), the incorporation into the LIP of natural features (through GIS mapping) and in the WAP, inclusion in the LIP of tools to implement green infrastucture/LID principles and consideration and facilitation of landform grading techniques and revegetation in hillside areas (Section XI.C.4), ~~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 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 the principal permittee and the permittees to develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and management of HCOC, and to collaborate to develop common principles and policies necessary for water quality protection, including avoidance of disturbance of various features, conserving natural areas, protecting slopes and channels, minimizing impacts from stormwater and urban runoff on natural drainage systems and water bodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely impact downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent

measures to reduce stormwater pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures.

-- for each permittee to incorporate into its LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects, the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss. ~~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 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, collaborate to develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, incorporate into the LIP and project approval process identified and GIS-mapped natural features, applicable tools to implement green infrastructure/LID principles for both public and private development projects and facilitate landform grading techniques and revegetation for hillside development projects, ~~review and if required, amend each General Plan and related documents,~~ revise and submit a revised WQMP meeting specific requirements, develop a 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 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 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

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

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 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, 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 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 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//lndustrial 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.

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."

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.

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.

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

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.

(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)

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

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

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

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.

Received
July 29, 2011
Commission on
State Mandates

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.

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.

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

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.

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;

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.

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

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.*~~

C.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;

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.

C.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 and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss.[footnote omitted]

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 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

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.

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.

[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.

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.

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.

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.

Commission on State Mandates

Original List Date: 7/6/2011
Last Updated: 7/29/2011
List Print Date: 08/04/2011
Claim Number: 10-TC-10
Issue: Santa Ana Region Water Permit - San Bernardino County

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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

Mr. David W. Burhenn Burhenn & Gest, LLP 624 S. Grand Ave., Suite 2200 Los Angeles, California 90017	Tel: Email Fax:	(213) 629-8788 dburhenn@burhenngest.com (213) 688-7716
Ms. Jolene Tollenaar MGT of America 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: Email Fax:	(916) 443-9136 jolene_tollenaar@mgtamer.com (916) 443-1766
Mr. Michael Lauffer State Water Resources Control Board 1001 I Street, 22nd Floor Sacramento, CA 95814-2828	Tel: Email Fax:	(916) 341-5183 mlauffer@waterboards.ca.gov (916) 641-5199
Mr. Kenneth R. Hunt City of Fontana 8353 Sierra Avenue Fontana, CA 92335	Tel: Email Fax:	(909) 350-7653 khunt@fontana.org (909) 350-6613
Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: Email Fax:	(916) 455-3939 andy@nichols-consulting.com (916) 739-8712
Ms. Harmeet Barkschat Mandate Resource Services, LLC 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: Email Fax:	(916) 727-1350 harmeet@calsdrc.com (916) 727-1734
Ms. Jill Kanemasu State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 322-9891 jkanemasu@sco.ca.gov

Mr. David R. Rice State Water Resources Control Board 1001 I Street, 22nd Floor Sacramento, CA 95814	Tel: Email Fax:	(916)341-5161 davidrice@waterboards.ca.gov (916)341-5199
Mr. David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd, Suite 121 Sacramento, CA 95826	Tel: Email Fax:	(916)368-9244 dwa-david@surewest.net (916)368-5723
Mr. David Lawrence City of Big Bear Lake P.O. Box 10000 39707 Big Bear Blvd. Big Bear Lake, CA 92315-8900	Tel: Email Fax:	(909)866-5831 dlawrence@citybigbearlake.com (909)866-7511
Mr. Jay Lal State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916)324-0256 JLal@sco.ca.gov (916)323-6527
Mr. J. Bradley Burgess MGT of America 895 La Sierra Drive Sacramento, CA 95864	Tel: Email Fax:	(916)595-2646 Bburgess@mgtamer.com
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: Email Fax:	(916)445-3274 susan.geanacou@dof.ca.gov (916)449-5252
Mr. Jack Lam City of Rancho Cucamonga 10500 Civic Center Drive Rancho Cucamonga, CA 91730	Tel: Email Fax:	(909)477-2700 jack.lam@cityofrc.us
Ms. Hasmik Yaghobyan County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Email Fax:	(213)893-0792 hyaghobyan@auditor.lacounty.gov (213)617-8106
Ms. Anita Worlow AK & Company 3531 Kersey Lane Sacramento, CA 95864	Tel: Email Fax:	(916)972-1666 akcompany@um.att.com
Mr. Joseph A. Hughes City of Highland 27215 Base Line Highland, CA 92346	Tel: Email Fax:	(909)864-6861 jhughes@cityofhighland.org (909)862-3180

Mr. Michael C. Hudson City of Montclair 5111 Benito Street Montclair, CA 91763	Tel: Email Fax:	(909) 625-9441 mhudson@cityofmontclair.org
Mr. Michael Fleager City of Chino Hills 14000 City Center Drive Chino Hills, CA 91709	Tel: Email Fax:	(909) 364-2600 mfleager@chinohills.org (909) 364-2695
Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: Email Fax:	(916) 939-7901 achinncrs@aol.com (916) 939-7801
Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Email Fax:	(916) 319-8315 marianne.O'malley@lao.ca.gov (916) 324-4281
Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Email Fax:	(916) 445-8913 jeff.carosone@dof.ca.gov
Mr. Wayne Shimabukuro County of San Bernardino Auditor/Controller-Recorder-Treasurer-Tax Collector 222 West Hospitality Lane, 4th Floor San Bernardino, California 92415-0018	Tel: Email Fax:	(909) 386-8850 wayne.shimabukuro@atc.sbcounty.gov (909) 386-8830
Mr. Edward Jewik Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Email Fax:	(213) 974-8564 ejewik@auditor.lacounty.gov (213) 617-8106
Mr. Allan Burdick CSAC-SB 90 Service 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: Email Fax:	(916) 443-9236 allan_burdick@mgtamer.com (916) 443-1766
Ms. Angie Teng State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 323-0706 ateng@sco.ca.gov
Ms. Carla Shelton Department of Finance 915 L Street, 7th Floor Sacramento, CA 95814	Tel: Email Fax:	(916) 445-8913 carla.shelton@doj.ca.gov

Mr. Chris Hughes City of Ontario 393 E. B Street Ontario, CA 91764	Tel: Email Fax:	(909) 395-2555 chughes@ci.ontario.ca.us
Mr. Mark Rewolinski MAXIMUS 3130 Kilgore Road, Suite 400 Rancho Cordova, CA 95670	Tel: Email Fax:	(916) 471-5516 markrewolinski@maximus.com (916) 366-4838
Ms. Socorro Aquino State Controller's Office Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 322-7522 SAquino@sco.ca.gov
Mr. Patrick J. Glover City of Chino 13220 Central Avenue Chino, CA 91710	Tel: Email Fax:	(909) 591-9806 pglover@cityofchino.org (909) 591-6829
Ms. Donna Ferebee Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: Email Fax:	(916) 445-3274 donna.ferebee@dof.ca.gov (916) 323-9584
Mr. Christien Brunette MAXIMUS 3130 Kilgore road, Suite 400 Rancho Cordova, CA 95670	Tel: Email Fax:	(916) 471-5510 christienbrunette@maximus.com (916) 366-4838
Ms. Evelyn Tseng City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: Email Fax:	(949) 644-3127 etseng@newportbeachca.gov (949) 644-3339
Mr. Amer Jakher City of Colton 650 N. La Cadena Drive Colton, CA 92324	Tel: Email Fax:	(909) 370-5065 Ajakher@ci.colton.ca.us (909) 370-5072
Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	Tel: Email Fax:	(916) 471-5513 julianagmur@msn.com (916) 366-4838
Mr. Leonard Kaye Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Email Fax:	(213) 974-9791 lkaye@auditor.lacounty.gov (213) 617-8106

Mr. Gregory C. Devereaux
County of San Bernardino
County Flood Control District
385 North Arrowhead Avenue, Fifth Floor
San Bernardino, CA 92415-0120

Tel: (909) 387-5417
Email gdevereaux@cao.sbcounty.gov
Fax: (909) 387-5430

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On August 5, 2011, I served the:

Co-Claimants Corrected Written Narrative
Santa Ana Region Water Permit – San Bernardino County, 10-TC-10
California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, effective January 29, 2010
San Bernardino County Flood Control District, County of San Bernardino, Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Highland, Montclair, Ontario and Rancho Cucamonga, Co-Claimants

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 5, 2011 at Sacramento, California.

Heidi J. Palchik